

INTRODUCTION TO  
AMERICAN GOVERNMENT



## THE CENTURY POLITICAL SCIENCE SERIES

EDITED BY FREDERIC A. OGG, *University of Wisconsin*

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# INTRODUCTION TO AMERICAN GOVERNMENT

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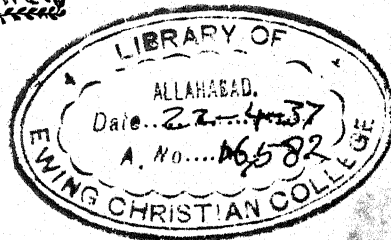
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Fourth Edition Thoroughly Revised

353  
026 I



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## PREFACE TO THE FIRST EDITION

This book is intended to supply, within reasonable compass, an account of the national, state, and local governments of the United States. The needs of the serious-minded general reader have not been ignored. But the person for whom the volume is primarily designed is the college student who finds himself enrolled in a general course in American government and politics in perhaps his sophomore year. It is with him in mind that three features, in particular, have been incorporated. The first is the innovation comprised in Part I. The college student is sufficiently mature to be brought into profitable contact with the more important elements, principles, and problems of political science in general—matters which relatively few ever study in separate courses. Experience shows that such contact stretches the mind and widens the horizon, to the student's great advantage when he comes to contemplate the American, or any other particular, governmental system. Definitions are established, concepts are worked out, background and perspective are gained, which result in both a saving of time and an enrichment of knowledge and interpretation. Nevertheless, the contents of this volume are so arranged that, at the instructor's discretion, Part I can be omitted altogether, or used only for occasional reference.

The second feature that has been deliberately stressed is criticism of existing political institutions and practices. If defects and failures seem sometimes to have been dwelt upon unduly, it has been only with a view to developing in the student an inquiring, discriminating, critical attitude, and directing his thought along forward-looking and constructive lines. A third feature, closely related, is the attempt to emphasize principles, rather than structural and procedural details. The student of American government must become master of a large body of facts. But he ought not to stop there. Facts readily slip from the mind. Besides, they are subject to ceaseless change. Principles, points of view, tendencies, influences and counter-influences, the reaction of human nature to political tasks and situations—these are the things with which

instruction in government must mainly deal if it is to be dynamic and socially useful.

Without pretending to supply exhaustive bibliographies, we have sought to guide both teachers and students to the best and most available books, magazine articles, and documents on the various topics taken up.

FREDERIC A. OGG  
P. ORMAN RAY

April 4, 1922.

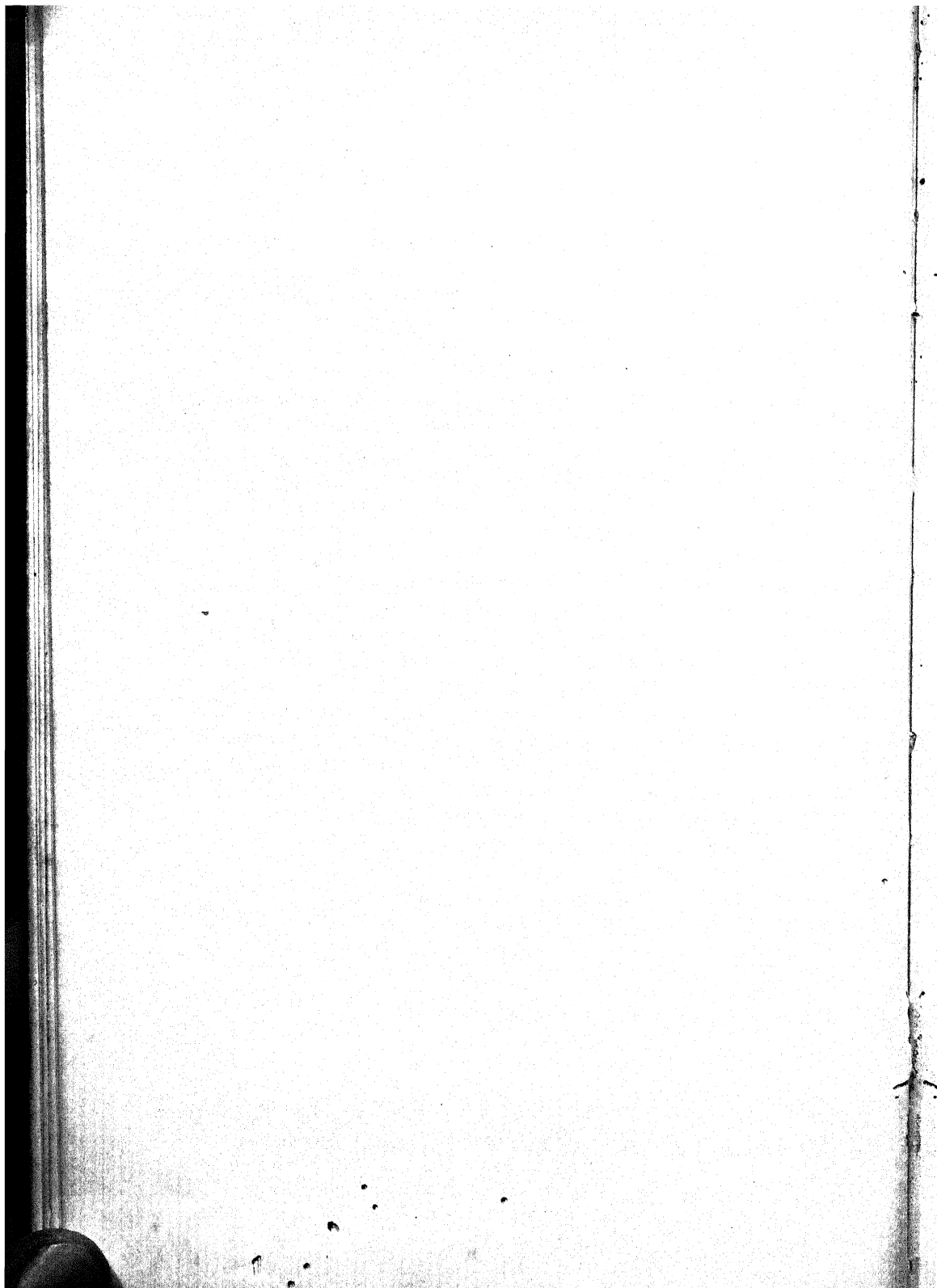
## PREFATORY NOTE TO THE FOURTH EDITION

In this new edition, we have been concerned primarily with bringing the book completely up to date, not only as to the facts recorded, but also in the emphasis placed upon current political problems, developments, and tendencies. We have, however, introduced some changes of arrangement and a considerable amount of new matter. Part I, outlining the elements of political science for purposes of orientation and background, has been rewritten; the historical chapters have been shortened; chapters dealing with instrumentalities of popular control have been moved to a position which is believed to be more logical; and other portions of the volume, notably those concerned with national administration, have been reconstructed. The bibliographical apparatus presented in foot-notes and chapter lists continues to occupy much space, and therefore to increase the bulk of the book. But it is believed that this feature will save time for both teachers and students, and stimulate the habit of wide and varied reading. As in previous editions, it has not seemed necessary to insert more than an occasional reference to any of the numerous well-known volumes of "readings," e.g., those of Pollock, Crawford, Mott, Johnson, Mathews and Berdahl, Reed and Webbink, Reinsch, Wright, and Maxey. It is assumed that users of the book will not need to be guided to these convenient aids—beyond the general recommendation here made.

We have continued to derive much profit from the friendly criticism of persons who have had experience with the book in the class-room.

F. A. O.  
P. O. R.

March 10, 1931.



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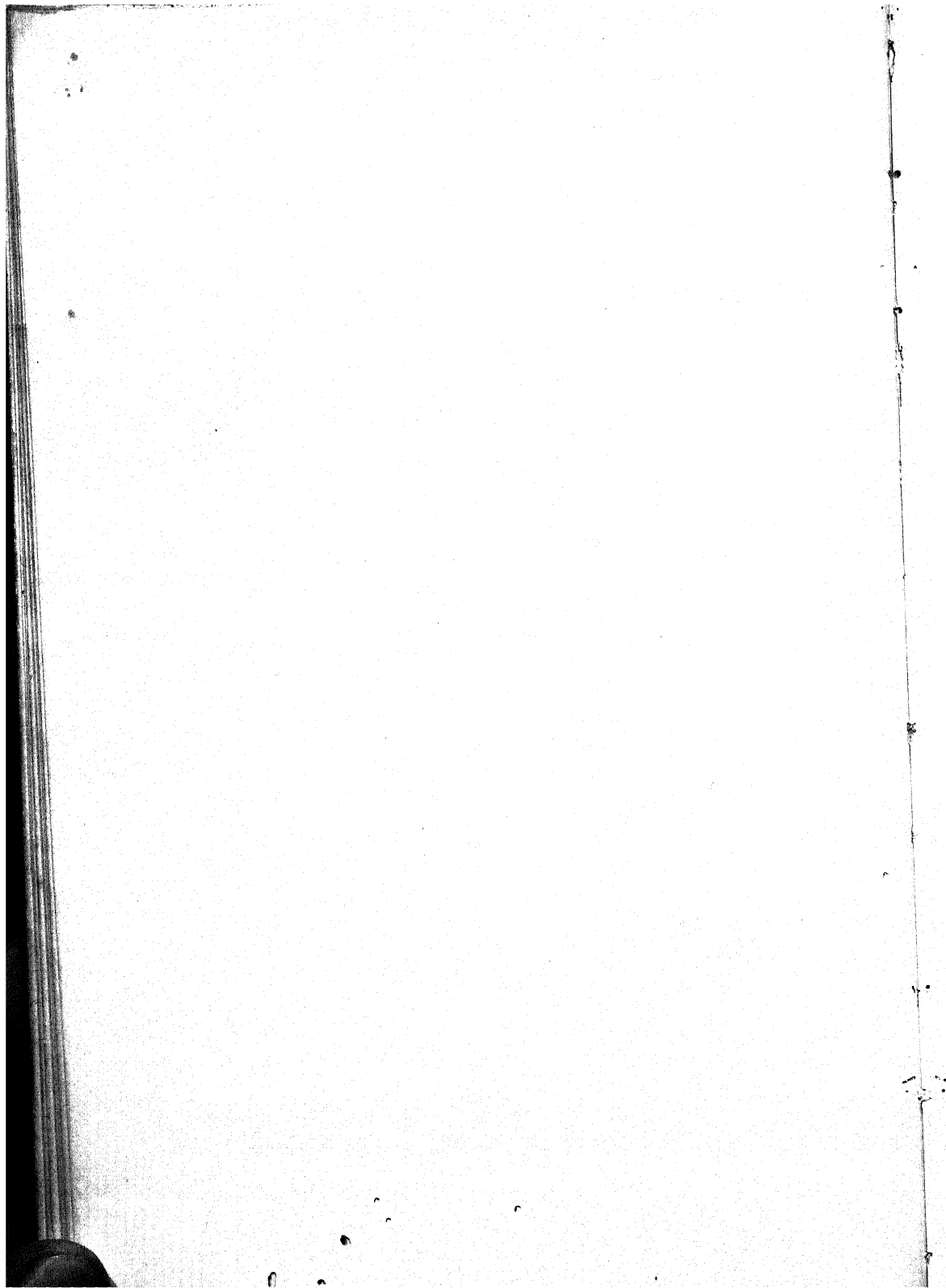
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INTRODUCTION TO  
AMERICAN GOVERNMENT



# INTRODUCTION TO AMERICAN GOVERNMENT

## PART I

### PRINCIPLES AND PROBLEMS OF GOVERNMENT

#### CHAPTER I

##### MODERN SOCIETY IN ITS POLITICAL ASPECTS

Every person in possession of his senses knows something of what it means to be a member of human society. He may be a Sudanese negro, a Hopi Indian, a Chinese junkman, an Iowa farmer, or a Wall Street banker. He may be prince, peasant, or pauper. Whatever his station, he is at least dimly aware of family, religious, economic, and political connections which tie him to his fellows and associate him with their common life.

Complexity  
of the mod-  
ern social  
structure

Among primitive peoples, the social structure is relatively simple. But as civilization advances, the lines of relationship grow more devious, social environments more complex; and in a modern country of high development, the social pattern becomes so intricate that the best efforts of scholars succeed in bringing it to view in only an imperfect way. Think for a moment of the social relationships of almost any person of your acquaintance. He has a home, and is a member of a family. That alone involves much. He belongs to a club or a lodge, perhaps to several. He is a church member, and is affiliated with a political party. There is also his trade union, employers' association, or other professional organization. As a citizen, he has to do with the government of his town, his county, his state, his country. There are the people to whom he sells, and those from whom he buys. And in most of these directions his tangible and immediate connections are only the initial stages or steps in a ramification of remoter relationships which neither he nor any one else can trace out to their limits. Consider, furthermore, the interrelations, not of individuals or of individuals with groups, but of group with group, of interest with interest, which our mod-

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CHAP.  
I

ern civilization entails—of great businesses and professions, of corporations and trusts, of churches and universities, of philanthropic and propagandist organizations, of federations of labor, of political parties, of parliaments, of other huge social structures, national and international, each competing with or otherwise impinging on the rest.

The lofty  
rôle of  
government

Obviously, not all of the relationships referred to are political. The state is only one of many social institutions. Quite extraordinary, however, is the extent to which the modern state dominates the social scene; or, to put it differently, the degree in which the functioning instrumentality of the state, *i.e.*, *government*, nowadays guides and regulates the things that men do, singly and collectively, as social beings. Government, indeed, envelopes us as does the air we breathe. We cannot get away from it if we would; we could not live without it if we tried. It is government that protects our lives and property, hears and adjusts our differences with our neighbors, validates and upholds our business dealings, regulates the conditions under which we labor. It is government that constructs our highways, builds our schoolhouses, lays our sidewalks, delivers our letters, keeps us from drinking contaminated water and eating impure food. We cannot bring a law-suit, have a deed recorded, inherit an estate, ship a consignment of goods, deposit money in a bank, marry or be divorced—nay, even buy a cigar—without dealing with government or complying with regulations that government has laid down. Government meets us at birth and records our arrival; government follows us to the end of the journey and issues the permit for our burial; government, indeed, is not content until it has seen such possessions as we leave behind us disposed of in accordance with rules that it has made.

Some ques-  
tions about  
government

How came government by this dominating rôle in human affairs? What are the different segments of society, the different geographical areas, in which government chiefly functions? What main forms does government assume, and what are the principal activities that government carries on? What differences of opinion exist as to the justification of government's present importance, and as to the extent to which political agencies ought to be permitted to assume still larger control over our social and economic life?

The state:  
I. Origins

Back of government stands the state; government arose as the medium through which the state makes itself visible and audible in shaping the destinies of men. No one knows how or when the

state, as a phase or form of social organization, came upon the scene. Aristotle indeed tells us that the state was the highest and last of associations formed by man. But even in his day, more than twenty-two hundred years ago, the state was an ancient institution, the origins of which were no better understood than they are at the present time. In the absence of information, there has naturally been a great deal of conjecture. One theory, widely held in the Middle Ages, is that the state—and with it government—is simply part of God's plan for the human race, and therefore is, in effect, a result of divine ordinance. Another view is that, after living for a time in a "state of nature," men found it preferable to set up a civil society, or political state, which they did by voluntary contract. A third notion is that the state arose from an evolutionary process broadening the family into a clan, the clan into a tribe, and the tribe into a national state. A fourth idea is that the state was created purely, or mainly, by force. None of these theories, however, can be proved, and the scientific student of social phenomena finds difficulty in accepting any one of them. About all that such an inquirer can say is that, while something may have come from all four of the sources indicated, the state was assuredly not created by any mere fiat or agreement—was, indeed, not "created" in any literal sense at all. Its beginnings cannot be referred back to any particular period of time. Rather, it was "a growth, an evolution, the result of a gradual process running throughout all the known history of man, and receding into the remote and unknown past."<sup>1</sup>

CHAP.  
I

Whatever its origin, the state is to-day the most universal of social institutions except the family. The world is indeed well spotted over with states—large and small, rich and poor, strong and weak, agricultural and industrial—all presenting certain features or characteristics without which statehood, in any exact sense of the term, cannot exist. One of these necessary features is population; a state without people would be an absurdity. A second is territory; for though recognition of statehood has sometimes been extended tentatively to peoples who for the time being had no actual sovereignty over a definite portion of the earth's surface, territory, like population, is an indispensable physical basis of a state's existence. A third requisite is political organization. The machinery of government may be rudimentary or intricate, stable or shifting. But without political solidarity and correlation

2. Essential  
features

<sup>1</sup> S. Leacock, *Elements of Political Science* (Boston, 1907), 41.



in some degree, there is no state. There must also be independence. Under modern conditions, a state cannot live to itself alone. Nevertheless, it is not truly a state if merely part of a larger political entity. Finally, a state must have some degree of continuity. Without claim to immutability or guarantee of permanence, a state must nevertheless be something more than a mushroom, here to-day and gone to-morrow.

These, then, are the necessary elements of a state—population, territory, political organization, independence, continuity. A state is not merely a piece of territory; it is not simply an aggregation of people; it is something more than a government. Territory and people are its physical bases, and government is the instrumentality through which it speaks and acts. But the state is itself an organism transcending any and all of its component factors. In a sense, it is an abstraction; yet it is no fiction. Nothing is more real in this world of ours than states.

The modern  
national  
state

It goes without saying that states may possess all of the bases or elements mentioned and yet be strikingly dissimilar. Three main types of states are, indeed, known to history: city states, empire states, and national states. The city state, consisting of an urban center and a limited amount of surrounding territory, is practically unknown to-day, but in times past it made a highly significant contribution to world development. Ancient Greece, in the era of its glory, was simply a collection of little city states. Rome started as such a state, and never entirely outgrew its organization on that basis. In the Middle Ages and earlier modern times, city states flourished in Italy, Germany, and the Netherlands; many, in fact, endured until years that men still living can remember. Empire states, also, were known to antiquity—wide-sweeping areas like the Assyrian and Babylonian dominions, welded together by conquest and ruled by force and craft. Rome built up an empire stretching from Britain to Persia; Chinese, Arabs, Mongols, Ottoman Turks, and other conquering peoples established their authority over lands of continental proportions; for centuries, central and western Europe derived a certain unity from the supremacy of a theoretically “universal” Holy Roman Empire. In modern times, the prevailing type of state has, however, been neither the city state nor the empire state, but rather what is commonly called the national state. Between the thirteenth and fifteenth centuries, the theory of universal empire weakened in western Europe, strong centralized monarchies emerged from feudal chaos, national consciousness and

aspirations developed, and separate, independent, self-contained national states became the political areas of principal importance. England, France, and Spain supply notable examples. Later, the idea of national unity triumphed in Italy and Germany; while a score of other European states, almost an equal number of Latin American states, the United States of America, and, in a remoter quarter, Japan, took form on similar lines.

Almost everywhere, therefore, government to-day is organized on the basis of the national state, each such state having its own free and independent political system. Most national states are of considerable size, both geographically and in population; some, like the United States, are decidedly large. The areas employed for governmental purposes in such a state are, therefore, not simply the state itself as a whole—as was true of the narrowly circumscribed city state—but also all manner of subdivisions—provinces, counties, districts, towns, and what not, varying in type, form, and name from country to country. At bottom, the governmental system of any national state is a single structure, all of the parts dovetailing into an articulated and integral mechanism. There is no such thing as a “national” government which can be studied and understood without taking into account the organization, powers, and functions of divisional areas. Conversely, “local” government is at many points incoherent and meaningless except as viewed in its interconnections with the national system of which it forms a phase or part. In some cases, government is more compactly unitary than in others. Thus in England and France no partly autonomous political areas are interposed between the national government centering at London and Paris, respectively, and the local areas such as counties and boroughs, departments and communes. In other instances, *e.g.*, Switzerland and the United States, we find a federal arrangement under which intermediate areas—cantons and “states”—enjoy a high degree of autonomy and to a large extent take over those relations with purely local units and authorities which under a unitary system the nation itself sustains. Fundamentally, however, government in any national state is, from top to bottom, an entity; if not a seamless robe, it is, at all events, a single garment.

In our fast changing world, this matter of the areas to be employed for governmental purposes is of great and growing importance. There is, first of all, the question of how largely the powers and functions of public control should be kept in the hands

CHAP.

I

The state and its subdivisions as areas of government

Governmental areas in transition

of authorities of nation-wide jurisdiction. This raises the whole issue of federalism, and also of administrative centralization. In the next place, there is the question of whether the existing lay-out of governmental areas in any given state is adequate to its purposes—whether, for example, the scheme of counties, towns, and villages in a Middle Western commonwealth is as satisfactory in the automobile age as it was in the ox-cart age when it took form. Recent city-county consolidations, proposals for and experiments with new metropolitan areas, and suggested plans of “regional” government indicate that the United States, no less than England, France, and other European countries, is feeling its way toward important readjustments of governmental areas, in response to revolutionary changes in social and economic life.<sup>1</sup> Finally, there is the question of whether the national state in a rapidly shrinking world can, or should, hope to maintain any such monopoly of governmental functions within its borders as it traditionally has enjoyed. To a degree, this question has already been answered. Slowly and painfully, there is growing up a certain amount of what may truly be termed international government. The development has not gone as far as many people imagine; even the League of Nations is to only an insignificant extent a government, in any proper sense of the word. But international law has a recognized place in the legal equipment of most states; the Permanent Court of International Justice is a true organ of international government; and the creation of other agencies of the kind, through the instrumentality of the League or otherwise, seems not improbable. To the familiar governmental areas of earlier days must, therefore, now be added the world itself, or at all events such large parts of it as are coming to be tied up in a common political mechanism.

The func-  
tions of  
govern-  
ment:  
1. The an-  
archist  
view

More important than the matter of areas is the problem of the lengths to which, in areas of whatsoever nature, the coercive authority of government shall be carried. On this point there has been, and still is, the utmost divergence of opinion. To begin at one extreme, there is the anarchist view that the state itself is, by its very nature, an instrument of tyranny—from which it follows that government, as we know it, is a means or method of unjustifiable repression. Contrary to popular understanding, the anarchist does not envisage a society in which there would be no regulation or

<sup>1</sup> W. B. Munro, “Do We Need Regional Governments?,” *Forum*, LXXIX, 108-112 (Jan., 1928); P. Studensky, *The Government of Metropolitan Areas* (New York, 1930).

control whatsoever. For the forms of compulsion employed by the modern state, he would, however, substitute the purely voluntary association of such people as might find it to their advantage to combine for mutual protection. We well might imagine that such associations would be of little use unless they exercised coercive power, and that in doing this they would turn out to be merely a fresh starting point for the rise of political states. Whatever the plan might lead to in practice, however, anarchism is conceived as essentially a negation of all that present-day states and governments represent.<sup>1</sup>

CHAP.

I

A second leading view is that, although states and governments are necessary to human well-being, and will continue so as long as men will not voluntarily deal justly with one another, the activities of public authorities should be confined to maintaining order and fending off enemies from abroad. So long as he respects the rights of his fellow-men—so runs the argument—every individual is entitled to be let alone. Every person knows his own interests best, and may safely be trusted to pursue them. In competition with others, he may survive or he may go down, according as he is industrious and clever or slothful and clumsy; but desperate and ruthless as the struggle may be, it in the long run serves the best ends of society, since only the competent can rise to the top and become the directors and leaders in industry, trade, and the professions. Interference from government stifles individual initiative, helps the weak to positions they have not earned, and in other ways impedes the wheels of progress.

2. The individualist view: *laissez-faire*

This kind of doctrine—commonly known by the French term *laissez-faire*—first gained prominence in the second half of the eighteenth century, when liberal thought was running in strong revolt against the paternalism of unreformed governments, and when theories of the rights of man were bringing the individual, as distinguished from the group, into a prominence never before experienced. In the economic field, it found forceful expression in the widely influential teachings of Adam Smith and the French Physiocrats; in the more purely political domain, it underlay the French Declaration of the Rights of Man, the American Declaration of Independence, the bills of rights in the Revolutionary constitutions of the American states, and the entire Jeffersonian political philosophy. It retained vogue, indeed, until the nineteenth cen-

<sup>1</sup> The best exposition of philosophic anarchism is to be found in Prince Kropotkin's *Fields, Factories, and Workshops* (London, 1899, new ed., 1919).

tury was far advanced. Even at the middle of that century, the English sociologist, Herbert Spencer, gravely argued that the state should not maintain a postal system or a mint, that it should not undertake to regulate labor in mines and factories, that it has no right to interfere with the wise severity of nature's discipline by legislation on poor relief and on matters of health.<sup>1</sup>

*Laissez-faire*  
defective in  
principle

The doctrine of *laissez-faire* had, in its day, much to commend it, and by emphasizing individual liberty and prompting the abolition of many undesirable forms of governmental restraint it did the cause of human development a splendid service. Even, however, as matters stood a hundred and fifty years ago, the assumptions upon which the principle was based were not wholly valid; and new economic and social conditions in later times have largely deprived it of such validity as it once possessed. Nowadays, at all events, it certainly can be argued that, far from knowing their own interests best—in such matters, for example, as education and sanitation—most people have not, and cannot be expected to have, the information or experience necessary for wise decisions; that no amount of individual comprehension of interests and needs can be of avail without organized coöperative action, as for example in the maintenance of schools, the construction of streets, and the regulation of railways; that the competition of individuals which whets wits and brings capacity to the top can proceed to best advantage only where a superior power, *i.e.*, a government, equalizes to some extent the conditions of competition and raises the struggle to a humane and moral plane. Too often, persons who cling to the rigidly individualist point of view fall into the easy supposition that state control necessarily and invariably restricts freedom—in other words, that government and liberty are incompatible. The state unquestionably does restrict freedom in some directions. But, on the whole, it makes possible a larger freedom than could be attained without it. Far from being mutually antagonistic, government and liberty go well together, as the history of almost any country, and especially of English-speaking lands, abundantly demonstrates.<sup>2</sup>

and  
becomes  
impossible  
in practice

Indeed, the crowning argument against the individualist doctrine rests, not upon theory, but upon experience. At the middle of the nineteenth century, *laissez-faire* was at flood-tide. Even at that date, however, changed economic and social conditions, flowing

<sup>1</sup> *Social Statics* (London, 1850).

<sup>2</sup> This subject is treated historically in J. W. Burgess, *The Reconciliation of Government with Liberty* (New York, 1915).

largely from the Industrial Revolution, called loudly for the regulative and corrective action of the state; and as succeeding decades passed, the need of such action steadily grew. There had always been people who dissented from the teachings of the individualists; and under the stress of the new conditions those doctrines gradually fell into discredit. To the old notion of the state as a necessary evil, and of government as existing only to keep men from injuring one another, succeeded a conception of the state as the supreme, indispensable, and inherently desirable promoter of human welfare, and likewise a view of government as an active, positive, expanding, regulative force, by no means restricted to the mere protection of individual rights. Indeed, the emphasis nowadays falls upon rights and obligations of a social, rather than an individual, nature. The state, through the agency of government, curbs individual action all along the line in the interest of the public well-being. It sanctions some industries and prohibits others, and regulates in great detail the conditions of employment. It issues charters to railroad, telegraph, and other corporations and prescribes the manner in which they shall carry on their business and keep their accounts. It licenses and controls banks and insurance companies. It limits combinations of capital, and of management, when it can be shown that their effect is to restrain trade unreasonably. It compels the citizen to educate his children and to refrain from acts that would endanger the health of the community. It seeks to prevent him from living in a badly ventilated house, or eating adulterated food, or drinking water that is polluted. It says who may teach school, practice medicine, sell drugs, pilot ships, and drive automobiles.

We are accustomed to think of the changes which science and invention have produced in the modes of human life as the most notable development of modern times. But from many points of view even this stupendous transformation is eclipsed by the revolution of thought (for which, indeed, the new physical and economic conditions were mainly responsible) which has led the state to extend its regulative action into one new field after another, and has brought the functions of government to their present amazing proportions. Nowhere have the effects of this political change been greater or more interesting than in our own country, where we shall presently study them in some detail.

The reaction against the eighteenth-century philosophy drove some men great distances, and as a result certain schools of thought arose that stand at the opposite pole of the political universe from

CHAP.

I

3. The view  
of govern-  
ment as an  
agency of  
general  
regulation

4. The  
socialist  
view

individualism. The most important of these is the "state socialist" school, which guided the destinies of Germany during the transition to the present republic, and which has a great following in England, France, and numerous other lands. There are socialists of many types. But with few exceptions they consider that the ills of modern society spring mainly from inequalities of wealth and opportunity, and that these inequalities are the natural and inevitable product of the free play of self-interest, of the competition of individual with individual, each seeking his own advantage. Not less public control, they say, is needed, but more; the state is not an evil, but a supreme and positive good. They would have much more regulation than there is at present in such domains as public health and education. They would bring railroads, canals, ships, telegraphs, telephones, gas works, waterworks, electric light plants, and other utilities under public ownership, national or municipal. But, above all, they would do away with private ownership and control of the instrumentalities of production and distribution of goods. They would have the state itself become, on a grand scale, an owner, employer, and manager, in all that pertains to the economic relationships of men. Private property would not entirely disappear. But it would be confined to such things as could not be made the basis of personal power or advantage. Land, mines, mills, factories, machinery, stores, banks and businesses, capital in all of its forms, would belong to the state, and public authorities would be trusted to manage them in the interest of justice, enlightenment, and general well-being.

Tendency  
to steady  
increase of  
govern-  
mental  
functions

In view of all that has been said, he would be a bold man who would attempt to draw up any definite list of the powers and functions that government in these days may exercise. There are, of course, certain purposes which any and all governments serve—certain tasks which any government worthy of the name performs. Beyond these, nothing is fixed. Wherever one goes, he finds government doing things that no one a generation ago would have thought of entrusting to it—nay more, things that no one a generation ago had even so much as heard of. William McKinley had no notion of government regulation of aerial transportation; Theodore Roosevelt hardly dreamed of a government that would license radio stations, prescribe their hours of operation, and fix their wave-lengths! And no end is in sight. Technological advances, changing ideas on social and economic subjects, hard experience in a score of directions, will go on bringing into play one new governmental activity

after another. To be sure, criticism of the tendency is heard every day. Old-line individualists deplore it; people who dislike some particular form of regulation, *e.g.*, prohibition, couch their disapprobation in more or less generalized complaints; so-called "pluralists" seek to relegate government as a whole to a less important place among social institutions.<sup>1</sup> Nothing, however, is more quickly learned from the history of government in all modern countries than that for every form of activity that grows obsolete and is discarded, two or three new ones find places in the ever-lengthening list. Ground once occupied by government is rarely surrendered.

This being the case, it is fortunate that living under government does not necessarily, or usually, mean anything approaching a complete surrender of individuality and freedom. The essence of government is, of course, regulation; and regulation undeniably means restraint. But even the most absolute of governments does not undertake to deprive people subject to them of all personal, or private, rights; and a main characteristic of modern constitutional governments is the liberality with which such rights are recognized, and not merely recognized but given protection equal to that given to the rights and powers of the government itself. As one might expect, the modes of surrounding private rights with the requisite guarantees are not the same in all countries. A favorite American method is to enumerate them at length in the written fundamental law. Our national constitution and most of the state constitutions contain either formal "bills of rights" or articles of an equivalent character, the object being to place the enumerated rights or liberties beyond the power of the government to curtail. Theoretically, there is advantage in this. Practically, however, there is some disadvantage, because changing conditions require that in the interest of justice private rights shall from time to time be defined afresh. Such redefinition may, of course, be accomplished by amending the constitution. Amending constitutions is, however, usually a difficult, and often a practically impossible, procedure.

A second plan, for which much can be said, is to put into the constitution a broad guarantee of private rights, while at the same time endowing the government with power to introduce such definitions and restrictions as experience shows to be desirable. This is

<sup>1</sup> E. D. Ellis, "The Pluralistic State," *Amer. Polit. Sci. Rev.*, XIV, 393-407 (Aug., 1920); F. W. Coker, "Pluralistic Theories and the Attack upon State Sovereignty," in C. E. Merriam and H. E. Barnes, *History of Political Theories, Recent Times* (New York, 1924), Chap. III.

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I

Government  
and the  
citizen:  
guarantees  
of private  
rights

1. Specific  
enumeration  
in a written  
constitution

2. Broad  
guarantee  
in a written  
constitution



the method of Switzerland, of Japan, and of some other states. Thus, the Swiss constitution, instead of making a flat grant of freedom of the press, says that "the freedom of the press is guaranteed; nevertheless the cantons, by law, may enact measures necessary for the suppression of abuses."<sup>1</sup>

Great Britain, France, and some other states follow a still different method. They make little or no attempt to define private rights in any constitutional document. It is true that certain rights of Englishmen are solemnly guaranteed in such instruments as the Habeas Corpus Act and the Toleration Act. These measures, however, are only statutes, and can be repealed or altered at the discretion of the authority that originally enacted them, namely, Parliament. In other words, the British Parliament is no more subject to legal limitations in dealing with individual rights than in dealing with anything else. It is true, also, that some of the best French constitutional lawyers hold that the "rights of man" enumerated in the Declaration of Rights of 1789, although not mentioned in the constitutional laws of 1875, have full force and sanction to-day. But even if this be conceded, it must still be recognized that the National Assembly, composed of the senators and deputies, has power, by amending the republic's fundamental law, to make any change in the status of the individual that it desires. So far as the law goes, therefore, a citizen of Great Britain or of France has no protection at all against the government under which he lives; the state which stands back of this government has not seen fit to impose definite restrictions upon it in the manner with which we are familiar in the United States. The reason why it has not done so, however, is that such restrictions have not been found necessary. Practical experience reveals that, even on the existing basis, private rights may be, and are, respected no less scrupulously than elsewhere. What effectively sustains them is the traditions of enlightened and liberal government, coupled with the responsiveness of the public authorities to the national will. If these guarantees had proved insufficient, others would have been provided before now.

Political philosophers and the makers of constitutions and political programs have from time immemorial busied themselves with drawing up lists of human rights. During the Puritan Revolution in England, the "natural" rights of men were commonly represented as being life, liberty, and property. The American

<sup>1</sup> Art. LV.

Declaration of Independence asserted that among the "inalienable" rights with which the Creator has endowed men are life, liberty, and the pursuit of happiness. The French Declaration of 1789 named as the "natural and imprescriptible" rights of man liberty, property, security, and resistance to oppression. There is, perhaps, no subject on which more theorizing has been done; and conceptions of "natural," "ethical," and "moral" rights that have been evolved are legion. Happily, we are concerned here only with legal, *i.e.*, enforceable rights—the rights which each state, in its own way, fixes for and guarantees to its citizens.

Human desires and aspirations are largely the same everywhere, and in the more advanced states to-day legal rights, however different in degree, are not very dissimilar in kind. They can be classified in various ways, but perhaps the most fundamental distinction is that between (a) substantive rights and (b) procedural rights. Substantive rights arise from positive immunities from restraint; procedural rights arise, rather, from restrictions upon the manner in which restraint can be lawfully exercised. Substantive rights are of many kinds, but can be thrown into four main classes. The first class comprises civil rights, pertaining to person and property. Familiar examples are freedom of speech, immunity from arbitrary arrest and imprisonment, ownership and free disposal of property, and guarantee against the taking away of property without just compensation. The second group relates to religious freedom, and includes exemption from restraint upon the expression of religious opinions and upon forms and modes of worship. The third group is political, and usually includes the right of peaceable assembly, the right of petition, and the right to seek and hold office—in short, the right to influence the policies of the government and to aid in carrying these policies into effect. A final group consists of personal liberties in general, as distinguished from the more fundamental and specific immunities—"exemption," as Lord Bryce puts it, "from control in matters which do not so plainly affect the welfare of the whole community as to render control necessary."<sup>1</sup> An example is the right of a man to paint his house any color that he likes, regardless of the æsthetic ideas of his neighbors.

Rights of a procedural nature are of a kind to protect persons against the government's exercise of powers—themselves entirely legal—in an arbitrary or unjust manner. Such rights have been

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Classes of  
legal  
rights:1. Substan-  
tive rights2. Pro-  
cedural  
rights

<sup>1</sup> *Modern Democracies*, I, 54.

## CHAP.

## I

more extensively recognized and defined in English-speaking countries than elsewhere, although they have won noteworthy recognition in constitutions framed in central Europe since the World War. They have been given special prominence in the United States, where the national constitution, particularly in the first eight amendments, abounds in provisions pertaining to them. A familiar example is the stipulation that "no state shall deprive any person of life, liberty, or property without due process of law." Another is the requirement that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to be informed of the nature and cause of the accusation."

Obligations  
of citizen-  
ship:

1. Alle-  
giance

The state sets up and maintains government as a means of promoting the well-being of men, and it has the same object in view when it guarantees individual rights as against governmental authority. In return, the citizen has obligations and duties. Three practically cover the ground: allegiance, obedience, service. That the citizen owes allegiance to the state of which he forms a part hardly requires argument. All states recognize treason, *i.e.*, breach of allegiance, as a heinous offense; as a rule, it is punishable by death. The naturalization of aliens is commonly so carried out as to stress the central fact in it, namely, the transfer of allegiance from one state to another.

2. Obedi-  
ence

Obedience is also an obligation. Obviously, there can be no effective government unless the laws are obeyed and the decisions of officers and courts carried out. Here, however, a difficult question arises. Are citizens obligated to obey a tyrannical government? The answer must depend largely on the circumstances. If the people can show that the government has usurped powers, or indeed that it has been tyrannical simply because it was able to overbear the public will, they are entitled to bring about a change of government if they can do so. If the people as a whole are not inclined to exercise this "right of revolution," the position of the individual dissenter becomes admittedly difficult. He may use his influence in all lawful ways to bring about a change. But unless, and until, his way of thinking prevails, he must obey the constituted authorities; or, if, in adherence to principle, he defies the law, he must accept the penalties that fall upon him and find such comfort as he can in the approbation of his conscience.

3. Service

The third great obligation is service. Except as definitely restricted by fundamental law, a government has full right to de-

mand of its citizens or subjects any kind, and any amount, of service of which they are capable. In times past, such service has taken many forms: service in the army or navy; assistance in suppressing riots or rebellions, or in arresting disturbers of the peace; office-holding (which has not always been considered a privilege or honor); jury service; labor on highways or other public works; and, by no means least, payment of taxes. In earlier centuries, men often helped support the government by turning over a share of their produce or by performing manual labor. Nowadays, however, taxation is the commonest mode. Rather than neglect their own affairs in order to work for the government with their own hands, the people turn over to the proper authorities a small percentage of their earnings; and with the money thus obtained the government hires its own workers, who, by giving all of their time, under a voluntary arrangement, attain a proficiency not to be expected of transitory and compulsory service. There is, however, no absolutely complete immunity from direct personal service. Even in the United States, any able-bodied man is liable to be called out at a time of emergency to become a member of a *posse comitatus*, or to assist in guarding property, or to aid in subduing a conflagration; he can be conscripted or "drafted" for military service; and he can be compelled to perform these duties, not only against his will, but at the point of the bayonet, and without hope of remuneration.

In view of all that has been said, it is unnecessary to labor the point that government deserves diligent study, not only by every inquirer into modern social behavior, but by persons who feel any degree of concern about their own rights, duties, relationships, and fortunes as members of the body politic. For two thousand years, the subject has challenged the attention of philosophers, scholars, and statesmen, and a vast body of material—historical, descriptive, speculative, argumentative—has been assembled concerning it. Like every live human interest, the theme is, however, always fresh. Indeed, the reasons for putting time and effort on it are stronger to-day than ever before. In nearly all parts of the world, government has passed out of the hands of hereditary monarchs, self-constituted oligarchies, and aristocratic families into the keeping of the people and their elected representatives; and this not only raises a multitude of new problems but creates a need not previously felt for wide popular information on governmental functions and processes.

Ideally, government should be studied as simply a phase or part

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## I

Its relation  
to social  
sciences  
generally

of general social science. Its rootage in history should be meticulously traced out; its intricate and growing connections with economics should be laid bare; its sociological settings and implications should be brought to view; its ethical aspects should be scanned; its psychological, and even biological, bases should be analyzed and interpreted. To do all this would, however, be a huge undertaking—too much so for any except scholars in a position to devote their lives to the task. Even they, in this age of specialization, are likely to confine their studies to some limited field or phase or period. Aristotle—still to be regarded as the world's most fruitful student of politics—took the entire realm for his province. But Aristotle's physical world could be set down in the state of Texas, and his intellectual horizon encompassed not one hundredth part of the vast expanse of knowledge now spread before the humblest inquirer. Practically, the present-day student of government, especially if he be of the more casual sort, must keep his attention pretty well centered on the purely political scene. He, however, should never forget that there is no political scene that is not also economic and sociological and psychological—that in watching government in action he is observing, not a machine running in a vacuum, but a widely ramifying social process. To far too great an extent, government has been studied in the past as simply a matter of constitutional and statutory texts, dates of elections, enumerations of powers, statistics of votes, sequences of formal procedures. Of late, it has been perceptibly enlivened and humanized by being thrown into relief against vibrant social backgrounds, interpreted in terms of powerful economic motivations, and brought within the range of inquiry of the psychologist, and even the psychiatrist. Further progress undoubtedly lies in this general direction; and it is hoped that something of this wider view will come to those who gain their knowledge of our American government from the pages that follow.<sup>1</sup>

<sup>1</sup> On government, or political science, as a branch of learning, see J. Bryce, "Relations of Political Science to History and to Practice," *Amer. Polit. Sci. Rev.*, III, 1-19 (Feb., 1909); H. M. Kallen, "Political Science as Psychology," *ibid.*, XVII, 181-203 (May, 1923); C. E. Merriam, "The Significance of Psychology for the Study of Politics," *ibid.*, XVIII, 469-488 (Aug., 1924); *idem*, "The Present State of the Study of Politics," *ibid.*, XV, 173-185 (May, 1921); *idem*, *New Aspects of Politics* (new ed., Chicago, 1930); W. B. Munro, "Physics and Politics—an Old Analogy Revised," *Amer. Polit. Sci. Rev.*, XXII, 1-11 (Feb., 1928); and W. F. Ogburn and A. Goldenweiser, *The Social Sciences and their Interrelations* (New York, 1927).

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## CHAPTER II

### TYPES AND FORMS OF GOVERNMENT

Our rich  
accumula-  
tion of  
experience  
with  
government

If human government has never reached the level of intelligence and efficiency envisaged by Plato two milleniums ago, and by philosophers and reformers in all ages since, the deficiency can hardly be ascribed to inexperience. There are few relationships of which the human race has had longer and fuller trial than those that flow from political organization. People everywhere in our day live under a government of some description, even if only the rule of a tribal chieftain; and the same has been true throughout the remotest eras to which our knowledge penetrates. Moreover, there has been experience with about as many different forms or types of government as it is possible to conceive. In so complicated a matter as government, there is no single universal standard of excellence: that which is best for one people may not be so for another; what is perfection to-day may be quite otherwise to-morrow. But at all events, the inability of government in all times and places to measure up to the highest requirements made of it must be due rather to the shortcomings of the men who operate it, or to the difficulty of the job assigned it, than to lack of discovery and trial of the different forms which it is capable of assuming. It will help to an appreciation of the American system of government, to which we shall turn shortly, if we call to mind some of the richly varied forms that political organization has actually taken the world over.

The nature  
of consti-  
tutions

Back of every government, whatever its nature, lies a body of principles, rules, and usages which determine its structure and define its powers—in other words, a constitution. And our inquiry must start with a glance at the principal forms which constitutions themselves are found displaying. Most people instinctively think of a constitution as a written instrument, a document, drawn up and put into operation at a given point in a nation's political experience; and in a very real sense a constitution is precisely that sort of thing. Of such nature is the constitution of the United States as framed at Philadelphia in 1787 and amplified by the

later nineteen amendments, or the constitution of the German republic made at Weimar in 1919, or that of the Irish Free State adopted in 1922. Beginning with the Revolutionary state constitutions in America and the French constitution of 1791, written constitutions have multiplied until governments in nearly all parts of the civilized world, except only Great Britain, are found operating under fundamental charters of the kind; and even in Britain, where the historic constitution has always consisted principally of scattered agreements, statutes, and judicial decisions, and of accumulated "conventions" or usages, more and more of the substance of the constitution is nowadays finding its way into writing—chiefly in the form of parliamentary enactments—even if no attempt has ever been, or likely ever will be, made to compress it within the four corners of a single document. No matter how carefully prepared, or how lengthy and detailed, the written instrument may be, the actual, working constitution of any country is, however, always something more than a mere document. Along with the document, it includes an ever expanding body of statutes, decisions, usages, and forms, written or unwritten as the case may be, but possessing no less vigor, and often no less importance, than the provisions of the formal instrument itself. One who would understand a constitutional system must therefore look far beyond the printed document nominally comprising the fundamental law.

It has often been remarked that constitutions are not made, but rather grow. This is literally true of certain constitutions, notably the English; and it is true of all in the sense that they are constantly adapting themselves to new ideas and conditions. Four methods of change are of chief importance: usage, judicial interpretation, statutory elaboration, and formal amendment. The conspicuous part which custom, or convention, has played in making the constitutional system of England what it is has often led to the assumption that it is more or less peculiar to that country, or at all events to countries in which no formal written constitution has been adopted, *e.g.*, China before the establishment of the present republic. In point of fact, simple practice or usage has contributed heavily to every constitutional system that has been in operation long enough to give custom a chance to develop. As we shall see, it has imparted to our own American government many of its most significant features and characteristics.

Cases coming before the courts often turn on the meaning of broad and general, sometimes ambiguous, constitutional provisions,

The ways  
in which  
constitu-  
tions grow:

1. Usage



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### CHAP. II

#### 2. Judicial interpreta- tion

and in framing their decisions judges find it necessary to say how such provisions are to be construed and what conclusions may properly be deduced from them. Such rulings establish precedents, and may end by becoming, to all intents and purposes, parts of the constitutional fabric itself. New circumstances, too, continually raise new questions and lead to new and varying interpretations. Even in countries, like England, where the courts have no power to pronounce a law unconstitutional, this function of interpretation is wielded freely and effectively. In the United States, it is constantly in evidence, and has contributed tremendously to constitutional growth.

#### 3. Statutory elaboration

Constitutions are extended and rounded out also by enactments of the legislature. They may expressly authorize such enactments on specific matters like private rights, administrative departments, or elections. But even if they are silent, legislation to fill up gaps and provide regulations where greater detail is needed is certain to find its way to the statute-books. Such legislation does not, of course, become part of the formal, written constitution; but when it deals with germane subjects it certainly adds, by so much, to the constitution in the broader and truer sense. A good American illustration is the acts of Congress that, starting with the constitutional requirement that members of the national House of Representatives shall be chosen directly by the people in the several states, prescribe that they shall be elected in single-member districts, by secret ballot, and on the same day throughout the country.

#### 4. Formal amendment

Finally, constitutions may be altered by express amendment; and there is hardly a written organic law to-day except the Italian *Statuto* that does not provide a mode by which this can be done. The machinery and processes used may be identical with, or may differ from, those employed in ordinary legislation. In England, no difference appears: Parliament enacts measures which change the constitution precisely as it enacts others that have no such effect; and no popular referendum or other check operates in one case more than another. In most countries, however, constitutional amendments are adopted only by a special procedure, frequently involving some direct participation by the people. Except in Delaware, where amendments can be put into effect by action merely of the legislature, amendments in all of the American states require popular ratification; and while changes in the national constitution are not voted upon by the electorate directly, they have to receive

the assent of the legislatures of three-fourths of the states or of a similar number of specially chosen state conventions.

CHAP.  
II

Classifica-  
tion of  
govern-  
ments

Every constitution, whatever its nature, supplies the necessary ground-work of a government; and the next thing to be noted is some of the kinds or types of governments for which such fundamental laws provide. From what has been said, it will be deduced that forms of government throughout human history have been legion. Even when Aristotle tried his hand at classifying them, he could not hit upon a scheme altogether adequate to the purpose; and certainly no one can hope to do so to-day. Only up to a certain point have any two governments ever been precisely alike. For purposes of the present broad survey, however, two major classifications may be suggested: (1) on the basis of the location of ultimate control, and (2) on that of the distribution of functions and powers. The first brings into view autocracies, oligarchies, and popular governments; the second, unitary and federal systems.

In an autocracy, the will of the prince is law; all political officers and organs are his agents; all acts of government are his acts. It does not, however, follow that all autocracies are alike. Two main types can be distinguished—absolute and limited. In an absolute autocracy, the exercise of sovereign power is wholly despotic; that is, it is dictated solely by the personal desires of the prince. In a limited autocracy, on the other hand, the prince chooses to be guided—normally, at all events—by a body of accepted rules and customs. The distinction must not be pressed too hard; for no matter how far a limited autocracy may go in the practice of liberalism, it remains an autocracy: the prince has himself, directly or indirectly, fixed the restraints under which he rules, and he is legally free to throw them off at any time.

Autocracies

The oligarchic type of government calls for little comment. The essence of it is the exercise of sovereign powers by a special, and usually a small, class of persons whose privilege arises from birth, wealth, reputed superior wisdom, or even a priestly function. There have been few true oligarchies in the past, and there are none of importance to-day. Perhaps the best example is the Venetian republic in the fourteenth and fifteenth centuries.

oligarchies

A third type is presented by governments in which the exercise of sovereign powers—or, rather (what legally amounts to the same thing), full and direct control over the agencies that wield these powers—rests with some relatively large portion of the general mass of the people. In the entire history of government, no concept

Popular  
govern-  
ments

is encountered which compares in importance with this idea of popular sovereignty. In a sense, the notion is both old and new. The mighty Eastern states of antiquity—Phoenicia, Assyria, Babylonia, Egypt—were pure despotisms. The early Greek and Roman republics, however, had a popular basis, and at Rome the theory of popular sovereignty survived long after the rise of the centralized Empire had obliterated the last vestige of actual popular control. The Middle Age was dominated by the idea of autocratic power—whether of emperor, king, or pope—wielded by divine right; and only in the era of the Protestant Revolt and the English Civil War did the idea again take hold that the people have a right to control the governments that hold sway over them. As an alternative to the doctrine of divine right, the theory was developed that the prince's title rose from a compact between himself and his subjects, or even from a "social contract" among the people themselves by which they agreed that they would submit to the control of a given princely government. These ideas of contract did not correspond to any ascertainable historical facts, but they served as the levers by which the notion of divine right was, speaking broadly, forever dislodged from the human mind.

Growth of  
popular  
government

As a result of the revolution of 1688, England became the first great modern state to achieve a government based on the sovereignty of the people. A hundred years afterwards, the principle found fresh and convincing expression in the state and national constitutions of America and in the Revolutionary constitutions of France. In the nineteenth century, it continued its conquests both in Europe and outside, and in the early years of the twentieth it made considerable headway in states, such as Russia, Turkey, China, and Japan, where autocracy still held sway. During and after the World War, it transformed political conditions in Germany, in "succession" states formed out of Austria-Hungary, in new states which split off from Russia, and even in Egypt and India.

Autocratic  
and popu-  
lar gov-  
ernment  
compared

We are so accustomed to the idea of popular government, and so fully in sympathy with it, that we hardly think seriously of undertaking to compare the principle of autocracy with it, in order to determine the relative advantages and disadvantages of the two. Yet such a comparison is worth while. It tends to impress the fact that in government, as in other realms of human endeavor, few things are wholly good or wholly bad, and it sets in a truer perspective the entire movement for popular rule. The conclusions which

flow from such a comparison can be stated briefly. First, an autocratic government has certain distinct advantages. There is a united will behind it. It has simplicity of structure. Its decisions are prompt and unmistakable. There is no doubt as to the amount and location of authority. There is continuity of personnel and of policy. There is opportunity to make unlimited use of experts. In the handling of public affairs, there is a directness and a freedom of resource which become especially advantageous in the management of foreign relations and the conduct of war.

These are not mere matters of theory. For two decades before 1914 the world was accustomed to marvel at the efficiency of German government, and especially of German administration. In a very large degree, this efficiency arose from the autocratic character of the German imperial and state political systems. The administration of finance, of tariffs, of social insurance, of railways, of the postal service, was carried on through machinery that operated beyond the reach of party politics, and largely outside the area of popular control; and—in contrast with the United States, where these and other activities are subject to interference from popular bodies, *i.e.*, Congress and the state legislatures—a remarkable measure of scientific precision was attained.

This, however, is only one side of the story. The advantages enumerated are, in the main, of a formal and technical nature. It is not impossible for them to be attained, at least in a degree at present unusual, in governments of a popular type. And they are in practice largely or entirely offset by certain disadvantages which inhere in autocracy, no matter how benevolent the autocrat may be. Government is not a mere matter of cold-blooded, efficient collection of taxes, trying of cases, and enforcing of laws. To achieve its full purpose, it must cultivate the aptitudes and aspirations of the people and give the fullest possible opportunity for their expression. It has a broad human, social, moral function. The fundamental objection to autocracy is that it means government whose will, impulse, and purpose lie outside of the people governed; indeed, its interests and aims are not unlikely to run sharply counter to those of the masses. The prince does not owe his position to the people; he regards himself as the personification of the state; the people are mere subjects; as against his authority they have no rights; the officers are his bureaucrats, not the servants of the community; the laws are his decrees, not expressions of the public will; where there are elective assemblies or other

Advantages  
of autocracy  
only  
formal and  
technical

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popular agencies, they exist by sufferance of the prince, and their activities are restricted by him as he chooses; the army is a royal tool, not the people's guardian, and militarism almost inevitably links up with bureaucracy. Under these arrangements, government can hardly be otherwise than arbitrary, oppressive, and unjust; and the modern world, or most of it, has said that it will have no more of them. The mechanical advantages of autocracy are outweighed by its moral shortcomings; and the thing that peoples nowadays must do is to find a way of realizing these advantages under governmental systems based upon principles of liberalism. Movements for efficiency in popular government have already gone far enough to show that the old notion that the best government is a benevolent absolutism is a fallacy.<sup>1</sup>

Direct  
democracy  
v. repre-  
sentative  
government

Popular government, however, is not the same thing in all times and places. The basic feature of it is control by the people over the exercise of the powers of sovereignty. But there are at least two principal ways in which this control can be wielded. The first is by keeping the management of affairs actually in the hands of the people themselves, so that the citizens in the mass make the laws, levy the taxes, decide questions of war and peace, determine all other matters of policy, and select and supervise the officials who carry on those parts of the public business which are of such a nature as to require personal and continuous attention. The alternative to this is the plan of entrusting law-making, formulating policy, and the appointment and supervision of most of the officials to persons chosen by the citizens to exercise these functions in their behalf. In either case, we call the government "democratic;" that is to say, it is based on the principle of "the rule of the many," which is what the word democracy means. But according as the one plan or the other is followed, we have (1) direct democracy or (2) representative government.

Disadvan-  
tages of  
direct  
democracy

At first glance, and simply as a matter of theory, direct democracy looks attractive. As a practical plan, however, it discloses many serious, and even fatal, shortcomings. In the first place, it makes prohibitive demands upon the citizen's time and energy; he must at all times be prepared to turn aside from his regular pursuits to discharge his duties as legislator, administrator, and judge. In the second place, the system assumes that the ordinary citizen is qualified to decide wisely what laws ought to be made

<sup>1</sup> J. Bryce, *Modern Democracies*, II, Chap. LXXIV, on "Democracy Compared with Other Forms of Government."

and what policies ought to be pursued. But we know that very often even the most experienced public men can reach such decisions only after extended, and perhaps highly technical, investigations. Still other obstacles suggest themselves: the wear and tear involved in bringing the citizenry together; the unfitness of a vast popular concourse to transact business in a sober and orderly manner; and, most obvious of all, the physical impossibility of operating the plan in a state of any considerable size. So weighty are these difficulties that the world has known few direct democracies. For considerable periods, the Greek city states of antiquity were organized on this plan; but they were very small, and relatively few of their inhabitants were conceived of as belonging to the active body politic. Many of the Swiss cantons were once governed in this fashion; but representative councils have now replaced the *Landsgemeinden*, or primary assemblies, in all except one canton and four half-cantons. New England towns afford other examples; but they are small subordinate areas, not states, and besides are in these days gradually going over to the representative system.

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The assertion will hardly be challenged that the most important advance ever made in the field of human government was the introduction of the idea of representation; for without some scheme of representation, popular government in large states could not exist. The ancient world was unacquainted with the representative idea; government was either direct democracy within a petty city state or autocracy over a broad imperial expanse. The concept originated in the Middle Ages and found its first practical applications in arrangements made by the Norman and Angevin kings of England for the assessment of taxes and the administration of justice. In the thirteenth century, it became the basis for the organization of the English Parliament, and thereafter it was turned to use in the Estates General of France, the Cortes of Spain, and many other national and local bodies. At the outset, representatives were conceived of as merely spokesmen of their respective "estates," cities, or other constituencies, selected to sit and deliberate with similar spokesmen of other class or geographical interests. As early as the sixteenth century, however, the view arose in England that the members of Parliament were representatives of the people at large, rather than merely of particular classes or places; and this is the commonly accepted theory of representation to-day, even though in practice the representative may often be inclined

Rise of  
the repre-  
sentative  
plan

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IIIts ad-  
vantages

to think of his constituents first and of the general welfare afterwards.

As a practical plan of political organization, the representative system has large and obvious advantages over direct democracy. Without taking ultimate control from the people, it puts the actual work of government in the hands of persons specially chosen for the purpose—persons who can be paid to give their attention to it undividedly, and who can be expected either to possess from the outset or to acquire the special knowledge and skill requisite to give the best results. The system obviates the necessity of bringing the people together in unwieldy assemblages. It interposes a check upon the action of impulsive majorities. Above all, it opens the way for the development of popular government in any state whatsoever, regardless of extent or population. During the past hundred years, it has spread round the world—to Australia and New Zealand, to various parts of Africa, to Latin America, to Japan, China, India, Persia.

Different  
forms taken

The principle is, however, applied in widely varying ways. Not only do representative bodies take many different forms, but some states impose checks or limitations not imposed in others. England allows the representative idea the fullest possible scope; the most sweeping powers—constituent, legislative, financial—are entrusted to Parliament, and the people hold back nothing except the privilege of calling their representatives to account at the polls. In Germany, Switzerland, and several other countries, on the other hand, the electorate retains extensive powers of direct legislation by means of the initiative and referendum; and the same is true in a number of our American states. Even, however, where such instrumentalities of direct democracy are superimposed on the representative mechanism, they are used sparingly; and after all due allowances are made, the fact remains that, to all intents and purposes, popular government has come to be synonymous with representative government.

Criticisms  
of repre-  
sentative  
government

This does not mean that people are universally satisfied with representative institutions as they now exist. On the contrary, the effectiveness, the capacity for future development, and even the inherent justification of representative government, have of late been challenged sharply in many quarters, particularly in post-war Europe.<sup>1</sup> Some of the criticism is aimed at nothing less than

<sup>1</sup> See, for example, R. K. Gooch, "The Antiparliamentary Movement in France," *Amer. Polit. Sci. Rev.*, XXI, 552-572 (Aug., 1927); J. Dickinson,

the state itself. But, quite apart from that, the representative system is under fire. Some find fault with it because of the incompetence of those whom it places in control of public affairs. Some consider that, as at present organized, it is wrongly based, *i.e.*, on artificial geographical areas rather than on significant professional, economic, and other "functional" groups. Others hold that it is perhaps suitable for Englishmen who originated it, but is not adapted to universal use. Still others doubt the ultimate feasibility of popular government in any form, and wonder—as did even so sane a political student as Lord Bryce—whether the swing of the centuries will not bring something entirely different in its place. There is no denying that twentieth-century conditions—by no means all of them traceable merely to the World War and its aftermath—subject the representative form of government to some very serious handicaps and strains; nor that, if it is to survive, it will have to show capacity for progressive adaptation along lines some of which still lie beyond the horizon. With all its shortcomings, however, the system prevails to-day throughout the greater part of the civilized world; the experience of generations has not disproved that it is capable of serving the ordinarily accepted ends of government; no practicable substitute is in sight which promises better things; it not only can be, but is being, re-adapted and developed (for example, in respect to the representation of minorities) under our very eyes. Unless we are prepared to give up the notion that the people should control the instrumentalities of their government, we are bound to conclude that, so far as we can see ahead, human happiness and well-being are largely dependent upon the effective functioning of our present representative institutions, in our present political state. To discover how these institutions can be sustained, improved, and made to guarantee us good government—to develop popular rule qualitatively as much as we have extended it quantitatively—is one of the high tasks of our generation.

Except in a very small state, the functions and powers of government are so numerous, complicated, and weighty that they must necessarily be parcelled out among a considerable number of authorities. And since the nature of the distribution made in any

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II

Distribution  
of govern-  
mental  
functions  
and powers

"Democratic Realities and Democratic Dogma," *ibid.*, XXIV, 283-309 (May, 1930); M. J. Bonn, *The Crisis of European Democracy* (New Haven, 1925); F. Fox, *Parliamentary Government—a Failure?* (London, 1930). Cf. J. Bryce, *Modern Democracies*, II, Chaps. LVIII-LXXX; F. A. Ogg, "New Tests of Representative Government," *Univ. of Chicago Record*, XI, 270-279 (Oct., 1925).



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particular case largely determines the form that the apparatus of government takes, we are brought to a second fundamental basis for classifying governments themselves; rather, indeed, two bases, since in so far as the distribution is made on territorial, or geographical, lines, it yields one set of governmental forms, and in so far as on lines of activity or function, another and quite different set. In point of fact, the two kinds of distribution are commonly made simultaneously.

Territorial  
distribution

Taking first the matter of territorial distribution, it should be noted that not every parcelling out of government work on a basis of geographical areas constitutes the kind of distribution here meant. For example, the collection of customs duties, the administration of immigration laws, the management of the postal service, is carried on in the United States and other countries in customs, immigration, and postal districts. But these areas exist only for administrative convenience; by its very nature, the work to be done must be carried on locally all over the land rather than at the capital. In all such districts, the authority of the central government is exercised in a uniform manner by persons who are officers, not of the district, but of the central government. The function is one and the same, even though the agencies through which it is performed are scattered over the country.

## Purposes

What we have in mind when we speak of a territorial distribution is, rather, units that are political, not merely administrative; that is, divisions to which are assigned considerable aggregates of governmental power, to be exercised largely or wholly at the discretion of the division (and therefore not uniformly), and through agencies created by and responsible to it rather than the central government. Such divisions are the states, counties, cities, and towns of the United States; the counties, boroughs, and urban and rural districts of England; the departments, arrondissements, and communes of France; the cantons of Switzerland. The reasons for turning over governmental power to subdivisions of these kinds are not difficult to discern. One object is to relieve the central government of an intolerable burden of work and responsibility. But the main consideration is that many of the tasks of government relate exclusively to particular sections of the country, which will prefer to assume immediate responsibility for them, and can see that they are exercised in accordance with variations of local conditions and needs. It is inherently just that separate communities should have control over their own affairs in so far as the interests of other

communities, or of the state as a whole, are not affected adversely; and it may reasonably be expected that such regulation will be wiser and more effective than if exercised by a distant and over-worked central government.

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The actual structure of a governmental system is determined in no small degree by the method employed in making this territorial distribution of powers. Here again there are two ways of accomplishing the purpose. On the one hand, a scheme of distribution, stipulating what the divisional areas of government shall be and what functions they shall have, may be written into the constitution. In this case, the distribution is made by the political sovereign, and the resulting governmental agencies, central and local, are coördinate in the sense that both derive their authority from direct grant of the sovereign and neither can encroach upon the field occupied by the other unless the sovereign assents. On the other hand, the constitution may go no farther than to create a single organization, endowed with full governmental powers, to which is left the task of providing for such territorial distribution as may be found desirable.

Two modes

According as the one plan or the other is followed, the resulting form of government is federal or unitary. The distinction arises, not from the mere fact of a territorial distribution of powers, for there is such a distribution in all governments, nor yet from the amount or kinds of power delegated to the local areas, but from the authority by which the distribution is made. To be concrete, the government of the United States is federal, because the sovereign people have provided in the constitution equally for the central, national government and for the governments of the principal divisional areas, *i.e.*, the states; it is not for the central, national agencies to say what powers or what organization the states shall have—nor, of course, for the states to make such decisions in respect to the nation. On the other hand, the government of France is unitary, because there we find only a single, integral government, with its seat at Paris, a government which has created the departments, arrondissements, and other local political areas (largely for its own purposes), and which is free to give and take away powers, to change the areas, or even to abolish them altogether.

Federal  
and  
unitary  
govern-  
ments

Few subjects have evoked more lively discussion among political scientists than the relative merits of these two types of governmental organization. The federal system has won high praise from Montesquieu, De Tocqueville, Sidgwick, Bryce, and many other

Advantages  
of the  
federal  
system

authorities; some writers, indeed, have gone so far as to pronounce it the best possible arrangement for human government. Its advantages have been summed up admirably by an American writer as follows: "It affords a means of uniting into a powerful state commonwealths more or less diverse in character and having dissimilar institutions, without extinguishing wholly their separate existences. It furnishes the means of maintaining an equilibrium of centrifugal and centripetal forces in a state of widely different tendencies . . . It excels all other forms of government in the effectiveness with which it combines the advantages of national unity and power with those of local autonomy. It secures at the same time all the advantages of uniformity in the regulation of affairs of general concern with those of diversity in the regulation of local affairs. Instead of concentrating the powers of the state in a single organ or set of organs, as in the case of the unitary state, federalism distributes them between a common central government and a number of local governments, and thus prevents the rise of a single despotism absorbing all political power and menacing the liberties of the people. By securing the advantages of self-government for the people in those affairs which are peculiarly local to them, it reconciles them to the loss of power which they have sustained through the surrender of their control over other affairs to the general government. Furthermore, through the right of local self-government, the interest of the people in local affairs is stimulated and preserved, they are educated in their civic duties, and this in turn reacts upon the character of the local administration. Federalism, observes Bryce, allows experiments in local legislation and administration which could not safely be tried in a large country having a unitary system of government. At the same time it supplies the best means of developing a new and vast country by allowing the particular localities to develop their special needs in the way they think best."<sup>1</sup>

Federalism  
sometimes  
the only  
feasible  
form

All of these considerations have weight. Nevertheless, the federal plan has serious defects, and some authorities refuse to recognize it as more than a makeshift resorted to as a means of attaining a modicum of union when circumstances make it impossible to establish a fully integrated system. It is a well-known fact that the United States set up the federal form of government, not because the framers of the constitution coolly weighed the advantages of

<sup>1</sup> J. W. Garner, *Introduction to Political Science*, 230-231. Cf. J. Bryce, *The American Commonwealth* (4th ed., 1910), I, Chaps. xxvii-xxx.

the federal and unitary forms and chose the federal as being the better, but because the states then existing could not possibly have been induced to make such a surrender of powers as the establishment of a unitary government would have required. Federalism in Canada, Australia, Germany, and Switzerland is of similar origin; and if in certain of the Latin American states—Brazil, Argentina, and Mexico—it rests upon a deliberate choice, this choice sprang rather from somewhat casual imitation of the United States than from a free and full study of all possible plans.

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In actual operation, federalism displays a number of defects. First, it is very complex. There are as many different sets of officials as there are governmental areas, resulting in overlapping, confusion, and waste. Second, there is a lack of unity. These sets of officials are coördinate in status; they will not take orders from one another; they are apt to work at cross purposes; they occasionally fall into actual conflict. This division of effort and of responsibility works out disadvantageously both in foreign and in domestic affairs. The United States has been repeatedly embarrassed in its efforts to enforce treaty obligations by legislation enacted by individual states in pursuance of their reserved powers over the rights of person and property. Much, indeed, of our political and economic history turns on the difficulty of securing adequate and uniform regulation of railway rates and services, labor, industrial corporations, taxation, conservation of resources, insurance, marriage and divorce—not to mention the enforcement of prohibition laws—under a governmental system that divides the power of control among more than two score largely independent authorities.

Defects of  
federalism

Third, the federal plan is likely to prove excessively rigid. The jurisdictions of the central government and of the several divisional governments are defined in a good deal of detail in the constitution; and the constitution of a federally organized state is usually difficult to amend, for the reason that, as a rule, it is necessary to obtain ratification by a substantial majority of the federated divisions, acting separately. Social and economic changes, however, come so rapidly under modern conditions, and create such novel and critical problems, that promptness and freedom of action are greatly to be desired. A unitary government, being in full command of the field, can proceed at any time to whatever legislative and administrative readjustments are deemed necessary. Probably no constitutional amendment will be required; but, if needed, it can usually be adopted with no great difficulty or delay.

On the other hand, a federal government is likely to be obliged to wait until conditions have become almost intolerable before a new grant of authority is forthcoming, if indeed it is obtained at all.

Finally, it is to be observed that, whereas it is commonly said that the federal system is the more favorable to local self-government, there is no essential reason why this should be so. As a matter of fact, in a number of instances it is not the case. Thus in England, where the unitary plan prevails, the local community enjoys almost, if not quite, as much control over its own affairs as does the local community in most parts of the United States. Although based on a centralization of authority, a unitary government may decentralize the actual exercise of this authority to any extent that the people who live under it find desirable.

Tendencies  
away from  
federalism

Herein we have some of the reasons why federal government is not now so highly regarded as formerly. It is significant that when, in 1909-10, the British colonies in South Africa drew together under a common government, they decided, after mature deliberation, to set up a unitary rather than a federal system, although the situation was one which quite as naturally suggested the federal form as did that in Canada in 1867 or that in Australia in 1900. Post-war Europe, in making numerous new constitutions, showed little liking for federalism. Yugoslavia and Czechoslovakia, although adapted by historical and cultural conditions for federal organization, chose unitary systems; and the German and Austrian republics, although ostensibly federal, are found upon closer examination not to be completely so. A further evidence of increasing appreciation of the advantages of the unitary type is the tendency in all federally governed states—nowhere more than in the United States—to exalt the central government at the expense of the divisional governments by additions of power, both through formal constitutional amendments and through interpretation and usage.

Distribu-  
tion of  
powers  
function-  
ally

Whatever its structure, a government has varied functions and wields powers of different kinds. More than two thousand years ago, Aristotle developed the idea that a government should contain three organs, one "deliberative" (or legislative), another executive, and a third judicial. The concept was worked out imperfectly, and during medieval and early modern times it was largely lost to view. Near the close of the seventeenth century, however, the English philosopher Locke made the "separation of powers" a cardinal feature of his system; Montesquieu, in France, put great stress upon it a half-century later; during the American and French

"Separation  
of powers"

Revolutions it gained wide currency; and it is still one of the most familiar of political principles, even though less influential than at an earlier day. The threefold classification which Aristotle suggested, *i.e.*, legislative, executive, and judicial, still meets with widest acceptance. It should be noted, however, that certain important French and American writers follow Thomas Paine, and even Montesquieu himself, in holding that the judicial power is not in essence distinct from, but is merely one aspect of, the executive power; also that an able American writer has developed an ingenious, although not wholly convincing, classification which adds to the traditional three functions two others, *i.e.*, electoral and administrative;<sup>1</sup> and, finally, that the architects of the current Chinese Nationalist constitution added also to the familiar three the function of examination (for the civil service) and that of control, *i.e.*, supervision, impeachment, and auditing.

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The legislative function is, in a word, that of ascertaining the will of the sovereign authority and expressing it in the form of laws. The judicial function is, in the main, that of hearing and deciding disputes which arise out of the enforcement of these laws. The executive function is that of representing the government as a whole (especially in its dealings with other governments) and of seeing that the laws are duly enforced. If an administrative function is to be distinguished from the executive—and there are good reasons for doing so—it is that of actually carrying out the provisions of the laws as declared by the legislature and interpreted by the judiciary. Under this construction, the executive function involves supreme oversight and the exercise of considerable policy-determining power, while the administrative function relates, rather, to the detailed, continuous, and largely routine business of law enforcement at first hand. There is, however, no clear line of division between the two.

Three main  
functions

This differentiation of public activities affords the basis for the second principal mode of distributing governmental powers already indicated, namely, in accordance with function. Nothing is more natural than to put the exercise of different kinds of power in the hands of different organs of government; and in every government there is a certain amount of such distribution, just as there is of necessity a certain amount of distribution on a geographical basis. One reason for a functional distribution is practical convenience. The tasks of government are so numerous and onerous that they

Reasons for  
functional  
distribution

<sup>1</sup> W. F. Willoughby, *Government of Modern States*, Chap. XI.

must be divided among many hands. A second object is the security of the public interests. No single governmental organ or group of organs, it is urged, should be endowed with so much power that it can become tyrannical; powers must be distributed among various agencies, which can be set to watch and check each other.

Both of these considerations weighed with the makers of our American constitutions. Acting in the light of their own experience, and profoundly influenced by the views of Locke, Montesquieu, and other European writers, they worked out both state and national governmental systems in which the basic principle was, and still is, the separation of executive, legislative, and judicial powers. The authors of these new organic laws had no desire, however, to put any branch of government in a position of such independence that it could usurp authority or disturb the equilibrium. Hence they interposed a series of checks and balances which caused the executive branch to become partly legislative and the legislative branch partly executive; and so effective have these restraints grown that, far from operating in water-tight compartments, the different branches of our state and national governments—executive, legislative, and judicial as well—dovetail into a mechanism which at many points is quite as completely unified as are governments, like the English, that make no profession of being organized on the plan of separation.

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## CHAPTER III

### THE ORGANIZATION AND CONDUCT OF GOVERNMENT IN A DEMOCRACY

Government  
something  
more than  
mere  
machinery

Viewed from the outside, government is a collection of more or less interlocked mechanical devices for making laws, deciding disputes, collecting taxes, controlling commerce, waging war, concluding treaties. For these purposes, we have legislatures and courts, presidents and ministers, bureaus and divisions, boards and commissions, army staffs and foreign services. Increasingly heavy is the burden of work thrown upon these authorities by the expansion of government activities previously alluded to; and marvelously—some people would say appallingly—rapid has been the multiplication of agencies, officials, and employees required for the day-to-day performance of the multifold tasks involved. And yet government is something far more than machinery. Legislatures and courts and commissions are not robots. They are groups of men, and of men with all the instincts, susceptibilities, passions, whims, virtues, and weaknesses that make men in other fields of endeavor what they are. They are men drawn from the general mass of the body politic, of which they remain a part. They have their inherited and acquired views, their family and social connections, their economic interests, their personal and group ambitions. They are played upon by cross currents of public opinion, by group pressures, by influences often too subtle to be discerned. In short, while government is to an extent a matter of machinery, it is also a matter of reactions, relationships, and controls. Psychology and economics have quite as much to do with it as constitutional forms and procedures. The mechanical set-up is only the frame to the picture.

Before turning to our study of the American system of government, it will be advantageous to take a bird's-eye view of agencies of public control, formal and informal, in democratic states generally.

The legis-  
lature

By common admission, the most important organ in any popular government is the legislature. This would be true even if the legislature were only, as the name implies, a law-making agency;

there is no more fundamental function of government than regulating the life of the people through the medium of law. In point of fact, however, all legislatures are more than mere machines for grinding out statutes—in many cases, very much more. Almost universally, for example, they have to do with making, or at least amending, the national or other constitution. The British Parliament makes any and all changes in the national constitution that it desires; the French Parliament, sitting as a one-house National Assembly, has the same power; our American Congress and our state legislatures adopt practically all constitutional amendments before they are submitted to the states or to the people. Legislatures also usually have important electoral functions. In most of the European republics, parliament chooses the national president; in Prussia and other German states, it chooses the ministers; in our own country, the House of Representatives may be called upon under certain circumstances to elect the president and the Senate the vice-president. In Britain, the House of Lords serves as the highest court of the realm; and in the United States the Senate acts, in effect, as an executive council in confirming appointments and assenting to the ratification of treaties. In the United States and a few other countries, executive and judicial officers are impeached on charges brought by the lower house and tried before the upper one. In all popular governments, the legislature, furthermore, serves as a sort of board of directors, laying out the work of the executive and administrative authorities, providing the necessary money for it, and holding the officials responsible for proper performance of it.

CHAP.  
IIIVariety of  
functions

It follows that by no means all of the acts of a legislature are in any proper sense laws. Many provide merely for the setting up of new governmental machinery; many are only appropriations of money; many simply grant pensions or other allowances; many are of the nature of administrative orders. Furthermore, a large part of the law—particularly in English-speaking countries—does not come from legislative hands. The vast fabric of the common law, which envelops us in America no less than our cousins across seas, developed from judicial decisions, sustained by custom, and was never enacted at all. Nevertheless, after all is said, the main business of a legislature is to make law, and rarely does one hear of a session of such a body that failed to eventuate in at least a few statutes either embodying law that previously did not exist or consolidating earlier enactments, amending them, and bringing

Law-  
making

them up to date. In countries having the cabinet form of government, and even in the United States, the initiative in legislation is in these days being taken more and more by the executive. But, to whatever extent the motive power may be supplied from this direction, the ultimate option and responsibility of decision rests with the legislative branch.

The theory on which legislatures have developed is that they form a sort of microcosm of the body politic and give expression to its will; and in all lands where they exist the question has had to be faced as to the type or kind of legislative branch that will serve these ends most satisfactorily. Shall there be two houses or only one? If two, shall they be coördinated in power? How shall the members be chosen? Who may take part in the elections? These and many other matters have to be settled whenever a new constitution is made.

By no one's planning, the English Parliament early fell into two branches, and until comparatively recent times it was regarded as almost axiomatic that legislatures should take that form. In the later eighteenth century, to be sure, a good deal of sentiment developed in favor of unicameralism, and experiments were made with it in France and also in two or three of the American states. The plan did not commend itself, and the bicameral system remained in general use until our own day, when again the unicameral form has won wide favor, being adopted not only in most of our American cities, in the Canadian provinces, and in several of the German *Länder*, but also in a number of national states that have come into existence since the World War, *e.g.*, Yugoslavia, Finland, and Estonia. The favorite arguments for the single-chamber plan are that it gives unity to the legislature, averts delays and deadlocks, and concentrates responsibility—that, in the famous aphorism of Siéyès, “if a second chamber dissents from the first, it is mischievous; if it agrees with it, it is superfluous.” The advantages of the two-chamber system, on the other hand, are said to be, chiefly, that it serves as a check upon hasty and ill-considered legislation, that it gives the citizen added protection against interference with his liberties, that it provides convenient means of granting special representation to functional groups or to areas such as our American states, and that it is not incompatible with as much predominance as may be desired for the legislative branch which most directly represents the people. In line with this last point, it is to be noted that many second chambers have become not

merely second, but secondary. As long ago as 1911, the historic—even if not in all respects actual—parity of the British House of Lords with the House of Commons was destroyed by a piece of legislation that leaves the aristocratic chamber powerless to defeat money bills, and with what amounts to only a suspensive veto on bills of other kinds. In Germany, Austria, and substantially all European countries with new post-war constitutions, the second chamber is merely an auxiliary body, with some important functions to be sure, but quite incapable of thwarting the will of the people as presumably expressed more perfectly in the lower branch. Coupled with the wide revival of undisguised unicameralism, the demotion of second chambers in countries where they survive has gone far toward stripping the bicameral system of the sacrosanct character which it once possessed.

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III

Second chambers, powerful or weak, differ greatly in their make-up, but are in these days more generally elective, and consequently more democratic, than in times gone by. Outside of Great Britain and Japan, there are few survivals of any hereditary, or other distinctly aristocratic, element; and not only is the reform of the British second chamber in the offing, but Japan has actually taken steps to give her House of Peers a somewhat broader basis. Canada has a Senate composed of appointees for life, but is increasingly dissatisfied with it. France has a vigorous and able Senate chosen by electoral colleges in the departments. Many countries—Australia, New Zealand, Sweden, Czechoslovakia, Poland, most of the Latin American states, and of course our own United States—provide for election directly by the people, grouped, as a rule, differently than for the election of members of the lower branch; and whatever may be said in defense of less democratic systems still in use elsewhere, the plan unquestionably represents the present world-wide tendency.

Second  
chambers

One cardinal feature legislative bodies the world over have in common: the members of the lower house are elected directly by the people. Beyond this, however, lower houses, like upper ones, show many structural differences. There is, first of all, the matter of the suffrage. In reality, of course, it is not the entire people who elect, but only those of them who come within the limits of the suffrage laws; and one of the most interesting chapters in the history of human government is that which records the way in which, starting in England and other countries with only a handful of qualified voters, the electorate has been broadened to include,

The popular  
branch:  
1. Suffrage

in most western lands, the great bulk of adult citizens, both men and women. In times past, all manner of restrictive qualifications have been employed—residence, age, sex, race or color, citizenship, ownership or occupation of property, tax-paying, education, religious belief, occupational or legal status. Such tests have now been sharply curtailed. Some stipulated age is regularly required; citizenship is usually a prerequisite; residence for a minimum period in a given electoral area is generally a *sine qua non*. But that is about all—apart, of course, from the exclusion of defectives and delinquents. Many of our American states have adopted literacy tests, but such are hardly known elsewhere. Plural voting, furthermore, has disappeared, except that in the country where it once prevailed most extensively, *i.e.*, Great Britain, men and women of certain qualifications may still vote in two constituencies in the same election. Some countries—notably Belgium, the Netherlands, Czechoslovakia, and Spain—have taken the somewhat questionable step of imposing penalties on qualified voters who, without sufficient excuse, fail to go to the polls.

2. Electoral  
districts

Almost as important as the suffrage is the question of how the people shall be grouped for purposes of representation. There are those who think that the grouping ought to be on a basis of interest or function, so that the manufacturers or the merchants or the organized labor of a country would have a chance to send representatives chosen solely by themselves. There is something to be said for this; and the fact cannot be denied that in earlier representative systems, in Continental countries, and even in England, the representative was thought of as a deputy or spokesman of an estate, or order, or class, and hardly at all as an agent of the general mass of the people resident in a given area or district. Advancing democracy, propelled by the equalitarian ideas of the French Revolution, brought the notion to the fore that the citizenry—or at least the electorate—should be parcelled out on purely geographical lines and represented in legislatures on a simple district basis; and this is the plan now generally prevalent. The districts employed for the purpose are ordinarily created by the legislature itself, which from time to time rearranges them in order to keep them approximately equal in population. In the United States and some other countries, these reapportionments are required to take place at regular intervals, following censuses; in Great Britain, there is no law on the subject and only one general redistribution of parliamentary seats has been made since 1885.

A main drawback of reapportionments is the temptation which they hold out to legislative majorities to "gerrymander" the districts, *i.e.*, deliberately to establish boundaries for them which will keep as many seats as possible out of reach of the opposition. Our own country has been particularly susceptible to this abuse.

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III

The electoral scheme may call for the choice of only one legislative member in a district, or of several. The single-member system prevails in electing members of the British House of Commons, the French Chamber of Deputies, the members of the American House of Representatives and of legislatures in our states. The plan is simple and convenient; it promotes acquaintance of the electors with the candidates, and tends to keep them in close touch with their elected representatives. It also, however, has shortcomings. It narrows the range of choice, and often results in the election of inferior men; it tempts representatives to become mere agents of petty local interests; it facilitates the vice of gerrymandering; and though sometimes defended as a means of enabling political minorities to capture at least a few seats, it provides no regular and assured representation for such elements. With a view to obviating these difficulties, and especially the last one, political reformers in many countries have urged the use of larger electoral districts, each returning several members, combined with some plan under which the seats to which any particular district is entitled will, at every election, be allotted to the different parties in proportion to the number of votes that their candidates have polled.

Proportional  
representation

There are, of course, various ways in which this principle of proportional representation can be applied. English proportional representationists prefer the method of the single transferable vote, under which the voter votes for one candidate and follows by indicating the order of his preferences among the remaining candidates, and the count is so made that these preferences are taken into the reckoning in declaring the election of candidates not winning on the initial count of firsts. Continental supporters of the principle favor a "list" system, under which the voter votes for a party list, and candidates on the various lists are declared elected according to one or another of a number of plans of computation that have been devised. The proportional system has not been adopted in England, except for a handful of university members of the House of Commons. But it is in use in the Irish Free State, the Scandinavian countries, the Netherlands, Belgium, Switzerland, most of the minor new states of central Europe, and in a peculiarly

ingenious and interesting form in Germany. It is employed, also, in municipal elections in a number of American and Canadian cities.<sup>1</sup> As an alternative to the familiar single-member district plan, proportional representation has the merit, not only of obviating most of the objections to that plan, but of overcoming what many people feel to be the inherent unfairness of any scheme under which election goes by simple majority, or, more frequently, mere plurality. The argument is strongest in countries having more than two political parties—as most countries (even Great Britain) now do. And while, in practice, the device shows defects—for example, the tendency to yield legislatures containing so many party groups that action is impeded and responsibility dissipated—it is safe to predict that, outside of the English-speaking world at all events, the system will become even more general than it is to-day.

The execu-  
tive branch

If the legislature be regarded as the most important organ, or branch, of a government, the executive is not far behind; to it fall many large and necessary tasks which legislatures are not fitted, and seldom or never undertake, to perform. The scope of the executive branch is not viewed in the same way by all political scientists. Some consider that all of the officials, functionaries, and machinery having to do with carrying out the laws and managing the public business are comprehended within the executive part of the government. In this view, the whole administrative establishment is included—practically everything that exists, indeed, except the legislature and the courts. Many French jurists, considering that judges, when construing and applying the laws, are doing work which is properly incidental to the executive function, look upon the judiciary as also a part of, or at all events closely auxiliary to, the executive branch. On the other hand, an American writer has secured some support for the idea, not only that the administrative function is different from the executive, but that the administrative establishment is to be regarded as a distinct and coördinate branch.<sup>2</sup> Amid these conflicting concepts, it is sufficiently satisfactory to think of the executive as, in a broad sense, comprising all of the agencies mentioned (except, one may still say, the courts), recognizing at the same time that there is a broad distinction between executive and administrative types of work, and that for purposes of accurate discussion it is best to limit the executive

<sup>1</sup> For a complete list of countries, provinces, and cities in which it is used, see *Proportional Representation*, 3rd Ser., No. 96 (Oct., 1930), p. 79.

<sup>2</sup> W. F. Willoughby, *Government of Modern States*, Chap. xvi.

to the chief magistrate and those most closely associated with him as ministers and advisers. Under this view, the most necessary and usual executive functions become those of (1) representing the state, as titular head, in its dealings with other states; (2) appointing to and removing from important civil and military offices; (3) exercising supreme command of the armed forces; (4) granting pardons and reprieves; and (5) seeing that the laws of the land are fully and impartially enforced. Other duties besides these often fall to the executive branch; almost invariably, for example, it bears some share in the work of legislation. Of purely executive functions, however, there are hardly any others.

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III

The main questions that arise when the makers of a new constitution take up the executive branch are: Shall the chief executive be one person or a number of persons associated together for the purpose? What shall be the basis and length of tenure? What relations shall exist between the executive and other branches of the government, particularly the legislature?

Single  
and plural  
executives

In general, the single executive has commended itself as preferable to the plural. It is to be observed, however, that in England and other countries having a cabinet form of government, while there is an individual (king or president) who is titular executive, the actual working executive is, rather, the group of persons forming the cabinet; also that Switzerland, while having a president, has as its actual executive a "federal council," composed of seven members, among whom the president is only *primus inter pares*.<sup>1</sup> The formal, or legal, chief executive may be either hereditary or elective. The hereditary type is not without advantages. It makes for energy and continuity in the execution of public policy; it tends to bring to the office a succession of persons specially trained for it; it obviates disturbing, and sometimes tumultuous, elections. On the other hand, there is the grave disadvantage that there can be no guarantee that the hereditary executive will be competent; and since, furthermore, an hereditary executive necessarily involves a monarchical form of government, the type can no longer be expected to meet with much favor, except, at all events, where the monarch is, as in England, only the nominal, not the real, executive.

Hereditary  
and elec-  
tive chief  
executives

For the election of chief magistrates, three main plans have been devised, according as the choice is made directly by the people,

<sup>1</sup> In Prussia, Bavaria, Baden, and some other German *Länder*, titular executives have been abandoned and executive power vested, in form as well as in fact, in the ministers.



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IIIModes of  
electing  
the chief  
executive

by the legislature, or by a special electoral college. As a matter of law, and in connection with national governments, the first plan is now hardly found outside of the German republic and the Latin American countries. France tried it in 1848, but with unhappy results,<sup>1</sup> and the view is widely held, not only that the people as a whole cannot be trusted to make a wise choice, but that popular election opens the door for dictatorships and other abuses. The method is, of course, employed in electing governors of states and mayors of cities in our own country. The second plan, namely, election by the legislature, prevails in France, in Switzerland, in Austria, and in several other lands. The third, *i.e.*, choice by a body of "electors," themselves chosen by the people, is, in form, the method employed in the national government of the United States, although the unanticipated development of party machinery and discipline has brought it about that our presidential electors merely register the will of the voters who have chosen them in the various states, so that for all practical purposes the plan of popular election prevails.

"Presiden-  
tial" v.  
"cabinet"  
government

The relations existing between the executive and the other branches of government involve numerous questions that cannot be taken up here. Fundamentally, they hinge on the distinction between "presidential government" and "cabinet government." In a presidential government, the chief executive derives his powers directly from, and is immediately responsible to, the electorate. He is not chosen by the legislature; he holds his office for a fixed term, regardless of whether his relations with the legislature are harmonious or otherwise; he stands on a common footing with the legislature, and in most of his acts cannot be controlled by it. Such is the system which we have in the United States. On the other hand, in a cabinet government the titular executive counts for little and the actual, working executive, *i.e.*, the cabinet, while not elected by the legislature, is composed of persons who are members of that body, who are indeed its leaders, who retain office only so long as they can collectively command the legislature's support (at all events, the support of the majority in the lower house), who accordingly form a sort of executive committee of that body and are in the first instance responsible to it, rather than to the electorate, for all of their acts. This is the type of executive

<sup>1</sup> By deft use of the "plébiscite," Louis Napoleon first secured election as president of the Second Republic and later obtained a ratification of the *coup d'état* by which he converted the country into an empire.

found, with some variations, in England, France, Germany,<sup>1</sup> and most other European countries.

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III

It is obvious that the presidential system is based upon a substantial separation of executive from legislative powers, even though, as is true in the United States, the executive and legislative authorities may be planned to check one another at important points. Under a cabinet system, there may be also, as there is in England, full recognition of the inherent difference between executive and legislative functions. Functions of both kinds are, however, entrusted to the same hands; and relations between the two branches of government—if such they are to be considered—become exceedingly close. The cabinet system has the obvious advantage of unity, and also responsiveness to the public will, since in the event of serious disagreement a parliamentary dissolution, followed by a general election, takes place without the necessity of awaiting the expiration of anybody's "term." The relative desirability of the two types is, however, not a matter for generalization, but is rather a question to be answered entirely with reference to the conditions existing in the particular case.

A principal function of the executive branch is, as has been stated, to see that the laws are duly enforced; and while it is straining matters a bit to think of the machinery through which the work of enforcement is carried on, and the routine business of the government attended to, as a separate branch, this function of administration is easy enough to distinguish from the executive function in the narrower and more proper sense. The problems presented by the administrative part of a government have been arranged by a leading American student of administration in four groups, according as they relate to organization, personnel, equipment, or practice and procedure.<sup>2</sup> The foremost question of organization is whether the long and growing list of distinct administrative services—tax collection, bank inspection, forestry, immigration, the post-office, public health, and what not—shall be organized on an essentially independent and coördinate basis or whether they shall be grouped in a few main departments. In general, our states have followed the former plan, and our national government the latter. Another question of organization is whether there shall be set up some central coördinating and controlling

Problems  
of admin-  
istration:

1. Organi-  
zation

<sup>1</sup> France and Germany, indeed, have presidents; but their governmental systems are of the cabinet type.

<sup>2</sup> W. F. Willoughby, *Government of Modern States*, 391.

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III2. Per-  
sonnel

agency, such as the Treasury in Great Britain, or the Budget Bureau in the United States. Problems of personnel are even more numerous and important. How shall the officers and employees in the several services be recruited? Shall they be subjected to competitive tests, and if so, of what nature? What opportunities shall be offered them for promotion? How shall their efficiency be measured and recorded? How shall they be instructed and disciplined? Under what conditions shall they be retired?

3. Equip-  
ment

The conduct of the public business requires the establishment and upkeep of gigantic physical plants and the purchase and distribution of vast quantities of supplies. This raises still another important group of problems—the problems of *matériel*, or equipment. Shall government property be cared for and equipment be procured by the men who are engaged in administration proper, or by specially organized “supply services”? Shall each branch of administration have its own supply service, or shall the purchasing and handling of materials be carried on through a central supply department? To what extent shall the government manufacture its own equipment? Finally, there are the problems of business practice and procedure—the preparation of reports, the keeping of records, the filing of correspondence, and, above all, accounting and auditing—which can no more be neglected by an orderly and efficient government than by a well-managed bank, mercantile house, or other private establishment.

4. Pro-  
cedureTechnical  
nature of  
adminis-  
tration

Even this brief enumeration suggests the outstanding feature of modern administration, *i.e.*, its highly technical character. Legislatures have need of techniques, and are still commonly deficient in this respect. But their work is largely that of determining policy, and as such it must always be controlled principally by personal and political reactions, attitudes, and interests. Higher executive authorities (whose tasks reach far beyond the mere enforcement of law) have also to do with policy, and, like legislatures, cannot be held down to procedures properly measurable in terms of scientific precision. Administration, however, is essentially a matter of managing and actually doing the work laid out for the various services in statutes and executive orders. How best to recruit employees becomes in all respects analogous to the problem of recruiting as faced by the Standard Oil Company or any other great private business. Whether to centralize the purchasing of supplies in a single operating unit is precisely such a question as might, and does, confront the United States Steel Corporation. Whether to use

one kind of material in building a post-office, or some other kind, is a matter for experts to decide, not a question for politicians to fight over. What system of accounting to employ in a government establishment is for trained accountants to determine. Throughout its length and breadth, administration is not a field for opinion and theory, but a domain for science and technology. These facts, of course, have not always been fully recognized. In times past, politics persistently projected itself into the conduct of administration, with consequences appalling to contemplate; even yet, men's ideas on the subject are none too well clarified. The very magnitude, however, which the task of administration has assumed in the twentieth-century state, coupled with a growing recognition of what scientific management has done for private business, has forced the adoption of a new point of view. The importance of administration has impressed itself as never before; greatly increased effort has been made to study out its intricacies and possibilities; and of late, larger progress has been made in improving the techniques of administration than in any other branch or phase of government.

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III

A highly important branch of every completely developed governmental system is the judiciary. In a general way, it may be said that the function of the courts is to hear and decide disputes, whether between individuals, or between individuals and corporations or other groups, or between individuals or corporations and the state as represented by the government. This work of deciding disputes involves, or may involve, far more than appears on the surface. First, the facts in any given controversy must be determined. Speaking broadly, the court does not seek out the facts for itself. It leaves this to the parties to the case, who, ordinarily through attorneys, bring forward witnesses and in other ways seek to get before the court a body of evidence showing that the facts are as they, the respective parties, contend. Next, the law must be applied to the facts as ascertained. The result is a judgment in favor of one of the contestants—a decision which, it should be emphasized, must be determined, not by the court's opinion as to what would be the ideal disposition of the case, but in strict accord with the law upon the given subject.

The  
judicial  
branch

Suppose, however, there is doubt as to what the law is, or that the case presents features that are not clearly covered in the law, or that two or more laws relating to the matter, emanating from different authorities, are in conflict. The court must somehow resolve the difficulty; and here is where the most significant func-

The func-  
tion of  
declaring  
the law

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III

tion of courts arises, namely, that of determining what the law is, what its scope and meaning are, and, when there is a conflict between provisions in the same law or between different laws, which shall prevail. A decision on such points, once made, is likely to have great weight on later occasions and with other tribunals; and it is easily possible to hold, as many jurists do, that the courts in effect "make" laws, even in a country such as our own in which the principle of separation of powers would seem to forbid them to do so. Nowhere, indeed, has this power of the courts to declare the law been carried to greater lengths than in the United States.

The  
pyramid  
of courts

Structurally, the judicial branch of a government consists of tribunals known as courts, composed of one or more judges, equipped with the requisite staff of clerks and other subordinates, and all more or less closely articulated in a single system. There must, in the nature of things, be tribunals of different grades or ranks. To take care of petty cases, and to bring the agencies of justice within easy access of all, inferior courts, with limited jurisdiction, must be set up in the local communities. Superior courts, for the trial of cases involving major crimes or important civil controversies, must also be provided; and it is both customary and desirable to arrange that decisions in the lower courts may, on appeal, be reviewed in the higher ones, in order that errors may be corrected and greater uniformity in the application of the law attained. Most states, furthermore, have a supreme court, with broad and final appellate jurisdiction, and usually with original jurisdiction in certain kinds of cases.

Different  
sets of  
courts

A question that inevitably arises when a judicial system is to be created is, Shall one set of courts be established to handle all classes of cases, or shall different sets be provided for different classes? The nearest approach to a single set of tribunals for the handling of all kinds of cases is in England, where an older and complicated judicial system was much simplified by legislation of some fifty years ago. On the other hand, France, Germany, and other Continental countries maintain a set of "ordinary" courts for the handling of cases that do not involve the validity of governmental actions and a separate set of "administrative" courts for the consideration of cases between individuals and administrative officials of the government. The tendency in the United States has been toward a considerable degree of differentiation. We have civil courts and criminal courts, courts of equity and courts of common law, probate courts, admiralty courts, domestic relations

and divorce courts, morals courts. When it is observed, further, that the United States, on account of the federal character of its government, is compelled to have two distinct sets of tribunals, one national and the other state—indeed, one national system and forty-eight state systems, taking no account of the territorial courts—it hardly needs to be added that our judicial organization is rather exceptionally complex.

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III

The weightiest requisite of a satisfactory judiciary is independence. In the last analysis, it is to the courts that every person must look for protection of his rights, whether as against individuals or corporations or as against the government itself; and it goes without saying that his interests will be in a precarious position if the judges are in danger of being dominated by other government authorities or intimidated by public or private demand or threat. How such independence can be secured that judges will be able to act without thought of consequences to themselves is a matter that has stirred a great deal of discussion. The problem is to throw around them as substantial safeguards as possible, without, however, putting them in a position of complete irresponsibility. On the whole, the experience of different peoples indicates rather clearly that the best results will be attained where the judges (a) are appointed, rather than elected, and without regard for party affiliations, (b) hold office during good behavior, (c) are not subject to removal by the executive, (d) can be removed only for misconduct, and by impeachment or on joint address, *i.e.*, petition, of the two houses of the legislature, and (e) are guaranteed against any reduction of their salaries during their tenure of office. These principles were first worked out in England, where they have been adhered to faithfully since the end of the seventeenth century. As we shall see, they operate to good advantage in our own federal judiciary, although they prevail to only a limited extent in the judicial establishments of the states.

Judicial  
inde-  
pendence

In the opening paragraph of this chapter, the point was stressed that government is a good deal more than mere machinery—that ideas, ambitions, interests, influences, quite as much as constitutions, statutes, rules, offices, make it what it is as a practical going concern. Even more true is this in a democracy than elsewhere; and it will repay us to glance a bit further at certain of the conditions under which so-called popular government nowadays operates. To begin with, such government is, or is supposed to be, under the control of the people; and its object, to carry out the public will.

Instrumen-  
talities of  
popular  
control

In a pure democracy, the people assemble and by their own direct action not only express their will but decree and make provision for its execution; pure democracy is government by mass-meeting. Pure democracy is in our time, however, almost as archaic a form of government as absolute monarchy; so that, practically, the problem of popular control becomes one of control through such channels as are open under a representative system. Some of these channels have already been mentioned. One of them is the election of legislative bodies which will presumably ascertain the public will and translate it into law, and of executive and other officials who likewise will be guided in their actions by what the people want. In a newer democracy, it is natural to carry the elective principle rather far. Experience, however, often shows that better results will be obtained by yielding to suitably responsible authorities the power to fill a good many executive, and especially administrative and judicial, posts by appointment. A second channel of popular control is an obvious survival from, or perchance a tendency toward, direct democracy, and takes the form of (1) the popular ratification or rejection of constitutions or constitutional amendments, (2) in some countries (and certain of our American states), popular initiation of both constitutional amendments and ordinary laws, to be voted on likewise by the people, and (3) the recall of elective officials by direct popular action. A third means, or agency, brought into play, not only in elections but in legislation, is the political party. And a fourth is that intangible and elusive, but certainly important, thing that we call public opinion. A word of comment on the last two will not be amiss.

Political parties are more or less coherent groups of people who, holding the same views on at least a few matters of widespread interest, seek by concerted action to gain control of legislatures and offices as a means of seeing that the policies which they have at heart are carried into effect. The definition is intentionally somewhat vague, because, speaking broadly, parties are themselves rather nebulous affairs. No one can explain to everybody's satisfaction how they originated, or why they exist, or at what moment a faction becomes a party and a party a faction. Many so-called parties have been hardly more than personal followings; many have been local or sectional rather than national; many have flashed into existence to live but for a day. Many old and respected parties, furthermore, belie their ostensible reasons for existence by becoming largely bankrupt of principles—bottles (to use a metaphor of

Lord Bryce) bearing different labels, but empty. And on this account, as well as because of the injury often done to the interests of good government by partisan spirit and methods, parties are many times spoken of disparagingly. They exist, some one has cynically remarked, not because there are two sides to every question, but because there are two sides to every office—an outside and an inside. With all due allowance, however, for the sham, ineptitude, and perversion with which they can often quite properly be charged, parties are useful, and indeed indispensable, tools or adjuncts of popular government. To quote Lord Bryce again, “no one has shown how representative government could be worked without them.” They furnish the only effective means by which men and women who think alike on public questions can unite in support of a common body of principles and policies and work together to bring these principles and policies into actual operation; in the mass, and without organization, the people can formulate no principle, agree on no policy, carry through no project. By the same token, parties afford the only means by which people who have the same objects in view can agree in advance upon the candidates whom they will support for public office, and recommend them to the electorate. They educate and organize public opinion and stimulate public interest by keeping the people informed upon issues of the day through press, platform, radio, and other channels. They furnish a certain social and political cement by which the more or less independent and isolated parts of a government (in so far, at all events, as they are in the hands of men belonging to the same party) are bound together in an effective working mechanism. Finally, the existence of parties assures that the elements in control of a government at any given time will be subjected to continuous, organized, and usually wholesome criticism.

To some extent, parties are a matter of psychology, springing from conservative, liberal, or radical propensities of men. Sometimes racial or religious factors enter in. More and more, however, the thing that divides people into groups is their economic interests and opinions. If you look over the platforms of candidates and parties in any country of the world to-day, you will find that the subjects that loom largest are taxes, tariffs, land policies, banking, labor, immigration, and the like. And since most of these are matters on which many different positions may be taken, people find it increasingly difficult to range themselves in two, three, or any small number of parties. Even England, the classic land of the bi-party



system, now has three major parties; and most countries of continental Europe have anywhere from five or six to twenty or thirty, raising many difficult questions of coalition government and minority representation. However numerous, parties can, of course, provide only a very rough picture of the infinite variety of ideas, attitudes, and interests that exist in any great state. Many individuals find themselves in complete agreement with no party; many belong only nominally, or not at all, to any party; though of course many more go along with a party from sheer habit or inertia, and, if challenged, could give no other reason for doing so. Some parties have an enrolled dues-paying membership, a written constitution, and a nation-wide organization quite as highly integrated as that of a government itself. The British Labor party is a case in point. More often the membership cannot be stated with greater definiteness than in terms of the popular vote—which, of course, in the case of all parties, is swollen by varying numbers of merely temporary supporters. Of machinery for recruiting members, raising money, nominating candidates, and carrying on campaigns, there is usually no lack.

Closely related to parties as a means of popular control over government is public opinion, which indeed often finds expression chiefly through party channels. Public opinion is a matter about which we hear a great deal but really know very little. The concept manifestly involves two or three assumptions: first, that many, if not all, of the individuals composing the body politic in a state take the trouble to form judgments or views on matters of civic import; second, that the individual attitudes thus created somehow merge in a composite attitude, or general will; and third, that this composite attitude, or opinion, or will, is capable of finding audible outlet or expression. We know, in point of fact, that there are serious limitations to this process of developing and focusing public thought on political, as indeed on other, subjects. More people than we like to believe never think about political questions, have no interest in them, know nothing about them, and certainly have no opinions on them or will concerning them. In this technological age, increasing numbers of governmental tasks and processes—especially those that fall in the broad domain of administration, but also many that devolve upon legislatures and courts—are of such a specialized and intricate nature that even laymen of superior intelligence, to say nothing of the general run of men, cannot possibly know enough about them to have worth-while opinions on

them. Furthermore, so-called public opinion on a tariff plan or a proposed treaty with Mexico may, on analysis, turn out to be the opinion of only an insignificant fraction of the electorate—and a not disinterested fraction at that. And a good deal of legislation will certainly, on inspection, be found to have sprung, not from any effort to carry out a definitely recognizable general will, but from influence exerted by small but organized and determined minorities. In the ear of Congress, the voice of one “pressure group” such as the United States Beet Sugar Association may sound decidedly louder and be far more persuasive than the half-articulate murmurings of a multitude of mildly protesting consumers.

Admitting, however, that vast numbers of voters refuse to be interested in questions that they are supposed to decide, that government is more and more coming to be a matter of accommodation or adjustment of group interests, and that on many political subjects of first-rate importance there is nothing approaching a true public opinion or general will, one must still maintain that, on at least some subjects and on some occasions, the concurrent sentiment of great masses of people—whether or not an actual majority—is a weighty influence in guiding a government along its course. Who shall say that the overthrow of the Stuarts in England, the abolition of slavery in the United States, the restriction of alien land-holding in California, were not, by and large, products of genuine public opinion? For a long time in the world’s history, public order, not public opinion, was the main concern of law and government; and for an absolute government, the concept still offers no problems. As democratic theory ripened, however, a way was opened for the processes and policies of government to be controlled by forces of popular origin; and though it would be wide of the mark to say that, even in the best-ordered democracies, the “people,” in any full and literal sense, invariably “rule,” the presumption is strong that any principle or policy that gets public opinion behind it will in the long run prevail. The proper course for students of government is, not to dismiss with ridicule the whole concept of public opinion, as some have done, but rather to discover the ways in which such opinion can be formed, ascertained, and directed toward desirable objectives, and to measure the force and effect of limitations imposed by the physical dispersion of the people, their preoccupation with non-political affairs, their incapacities, and especially the overpowering impacts of economic and other group interests.

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## PART II

# THE FOUNDATIONS OF GOVERNMENT IN THE UNITED STATES

### 1. HISTORICAL BACKGROUND

#### CHAPTER IV

##### COLONIAL BEGINNINGS

In preceding chapters, we have sought to view, in a large way, the rôle of government in modern civilization and to call to mind some of the principal forms that governmental organization takes in different countries the world over. The theme is indeed intriguing. In this book we are concerned primarily, however, with the significant features of a single scheme, or system, of government, namely, that under which we live in the United States; and to this subject we now turn.

Americans study the government of the United States chiefly because it is their own government. It envelops, controls, and serves them every day and hour; furthermore, it is theirs to guide and manage as they wish. There are reasons, however, why our government—national, state, and local—challenges attention not merely at home but also in foreign lands. It is the political system of a thirteenth of the population of the globe, of one of the largest of countries, and of probably the most powerful of modern states. More important than this, its success first disproved the old notion that a republican form of government is not suitable for a large and expanding state, and at the same time demonstrated the feasibility of the federal plan of political organization as applied over a broad territory. Still further, the American system has been viewed from afar, and rightly, as a great experiment in democracy. Not that the government of the country was completely democratic in the earlier days. It is not in all respects democratic even now; and since the World War other systems have rivalled it closely in this regard. For more than a hundred years, however, foreign observers were frank to admit that popular government and social

Why the  
government  
of the  
United  
States  
deserves  
study

equality, such as existed on this side of the Atlantic, were "new things in the world."<sup>1</sup>

Finally, the forms and usages of American government have not merely interested, but influenced, the makers of political systems in other parts of the globe. There has undoubtedly been less copying than Americans are wont to suppose; in the array of new constitutions adopted in central and eastern Europe at the close of the World War, American influence does not loom large. Throughout a hundred years, however, much has been borrowed by the Latin American republics, a good deal by the British dominions, and something by Continental Europe, and even by Japan, China, Turkey, and other Asiatic states. American experience with federalism, for example, has had an influence worthy of being compared with that exerted by French principles of administrative organization, and even by the English cabinet system.<sup>2</sup>

English  
origins  
of our  
political  
institutions

The attempt is sometimes made to set up a government having little relation to a people's political past, and owing its origin to mere fiat. The recent history of Russia, China, and Turkey affords illustrations. The government of the United States, however, is not of that sort. On the contrary, it is the product of long generations of political experience and growth. It is English as well as American, and one who would see how it has come to be what it is must run the lines of historical derivation back beyond the adoption of the constitution, beyond the Declaration of Independence, even beyond the coming of the Mayflower, into the England of the Bill of Rights and the Habeas Corpus Act, of Magna Carta and the early common law, and even of Saxon folk-motes and "dooms." Other people besides Englishmen, of course, had a share in building up the nation, and no one needs to be told that the non-English elements in our present population and culture are of fundamental importance. For a hundred years before the Revolution, however, the country, as it then stood, was English territory, governed by Englishmen under forms and usages almost wholly English. The settlers of New England and Pennsylvania and the Carolinas were themselves mainly Englishmen, who indeed had various motives for coming to the New World, but who invariably brought their English customs and ideas with them and had no intention of becoming anything other than Englishmen. They brought with them, too, all

What the  
colonists  
brought  
with them

<sup>1</sup> C. Becker, *The United States, an Experiment in Democracy*, 2.

<sup>2</sup> J. Redlich, "The World-wide Influence of the United States Constitution," *Boston Univ. Law Rev.*, X, 195-201 (Apr., 1930).

the rights and liberties which their forefathers had wrested from tyrannical nobles and autocratic kings: the right to participate, through representatives, in the making of laws; the right to equal standing before the law; the right of self-taxation; the right of jury trial; the right to invoke the privilege of habeas corpus; the right of petition; the right of assembly. In so far as it was applicable under American conditions, the common law was theirs in the new home no less than in the old. The colonial governments, whether imposed from London or set up by the colonists independently, were English-made and English-controlled.

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After the Revolution, the United States went its way as an independent nation; from then on, American history and English history flowed in separate channels. The Revolution was not, however, the cataclysm that it has sometimes been painted. Far from toppling the existing political and social order into the dust, it merely opened the way for its fuller and freer development, on lines suggested or made necessary by the special conditions existing in a new and growing country. The termination of control from across seas meant, of course, some change. Government and law, however, went on much as before. The colonial charters became the bases of the new state constitutions; indeed, the charter granted to Connecticut by Charles II in 1662 served as the constitution of that state until 1818, and the charter received by Rhode Island in 1663 was superseded by a new constitution only in 1842. The colonial governor, with powers considerably lessened, became the state governor. The colonial legislature reappeared almost intact as the state legislature. County and town governments evidenced little change. The suffrage was broadened somewhat, but not greatly. Qualifications for office-holding were relaxed, but only slightly. Everywhere the English common law remained the basis of the legal system.

The Revolution only a secession

The building up of a national government under the Articles of Confederation, and eventually under the constitution of 1787, entailed somewhat more of a break with the past; and the steady expansion and readaptation of our political system since 1789 has brought us so far from our point of departure that the contrasts between, not only the English government and our own, but also our own government as it stands to-day and as it stood a hundred years ago, strike the observer very forcibly. These contrasts are, indeed, vast and significant, and they will call for a good deal of attention in the pages that follow. Yet it must never be forgotten that the development of government in the English-speaking world

Great changes since 1789, yet underlying continuity

has been a long, steady progression, in which the United States has shared deeply, and that newer forms and practices in this country, as in the motherland beyond seas, are grounded upon and circumscribed by institutions and usages that are very old.

The early English settlements on the Atlantic seaboard were established under diverse conditions and by dissimilar groups of people. Virginia was founded by a London trading company, and for a time was managed like any other commercial corporation. Plymouth was settled by earnest men of religion, whose main object was to find a place where they could worship as they desired. Maryland was colonized under the auspices of a great Roman Catholic proprietor, Pennsylvania under the guidance of a Quaker magnate. The first of the permanent colonies within the present limits of the United States, furthermore, dated from 1607, and the last from 1733—a stretch of a century and a quarter. During that time, English government and civilization at home underwent important changes, some of which were reflected in America. Likewise, the settlements were drawn out along a north and south seacoast more than twelve hundred miles in length as the crow flies, embracing the subtropical borders of Florida and the snow-capped hills of New England.

Under these circumstances it was inevitable that the thirteen colonies should differ considerably in political organization. Some were governed under charters granted by the king to a single proprietor, as Baltimore or Penn; others, under charters issued to a company or corporation; still others, lacking a charter or other fundamental law, drew up constitutions of their own, as did Connecticut in 1639, and made these serve until formal charters could be obtained. Until late, the mother country had no fixed policy concerning forms of colonial government. Hence the provisions of the charters on this subject were not always the same; and naturally those governments which were set up by the colonists themselves, although following English precedents, represented a spontaneous adjustment of political means to time and circumstance. Virginia, with its widely separated plantations strung along the river banks and its sharply divided population of land-holding aristocrats and dependent servants and slaves, could not have been expected to employ the same political forms as Massachusetts, with its compact, town-dwelling, and relatively homogeneous population.

Taking the colonial period as a whole, there was, nevertheless,

a pronounced tendency toward political uniformity. All of the colonies except Rhode Island, Connecticut, Maryland, Pennsylvania, and Delaware ultimately became "royal provinces," administered under royal commissions by governors appointed directly by the king; and the five colonies named had charters providing for governments in most respects like the others. All of the thirteen had legislatures, which steadily strove, with varying success, to gain greater power. All had the same common law and practically the same judicial organization and procedure.

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IV

Yet a  
decided  
tendency  
to uni-  
formity

Every colony was a royal enterprise in the sense that the lands which it occupied belonged to the sovereign and that its government owed its validity to his direct act or tacit assent. The royal control was more vigorous at certain periods than at others, and was more frequently asserted in the royal provinces than elsewhere. But in all cases it included the right to revoke or alter charters, to disallow, or veto, colonial legislation (except in Maryland, Connecticut, and Rhode Island), to hear and decide appeals from the courts, and (except in Connecticut and Rhode Island) to appoint the governor directly or to confirm his appointment when made by a proprietor. Until past the middle of the eighteenth century, Parliament was regarded as having no general power of control over the colonies. Its acts applied to them only when containing an express provision to that effect; and such provisions were rare.

Control  
from  
England

The main features of government in the colonies—which, as has been suggested, are of interest because they so largely predetermined the form and character of our state governments to-day—can be indicated briefly. The chief executive was invariably a governor, appointed by the crown in the eight royal provinces, selected by the proprietor (with royal assent after 1696) in the proprietary colonies, and elected by the people in Connecticut and Rhode Island. The position which the governor occupied naturally varied somewhat according to the type of colony at the head of which he found himself. In the case of the royal provinces, which were the most numerous, he had the twofold duty of looking out for the interests of the British crown and at the same time serving as local head of a partly independent government. In the first capacity, it fell to him to proclaim and enforce the orders of the home government, to keep the king and his ministers informed upon colonial conditions, to advise upon policies and measures, and to oversee the minor royal officials stationed in the province. In the second capacity, he enforced the laws made in the colony, appointed various civil and

The  
colonial  
governor



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IVControl  
over  
legislationRestrictions  
on the  
governor's  
powersThe legis-  
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military officers, commanded the armed forces, issued warrants on the treasury, granted pardons and reprieves, and represented the colony in its dealings with other colonies and with foreign states.

The governor also had much to do with legislation. He summoned, prorogued, and dissolved the assembly. He sent messages to that body and addressed it in person, not only communicating the wishes of the home government, but making recommendations of his own. In most colonies, he nominated the members of his advisory council, which also served as the upper house of the legislature; and he presided over its deliberations. He had an absolute veto, and used it freely. Furthermore, he had important judicial functions. His commission regularly made him "chancellor," and that meant that he was head of the highest court in the colony.

On paper, the governor's powers looked impressive; and there is no denying that he had enough authority to cause him in plenty of instances to be regarded as an autocrat. There were, however, limitations. Powers conferred at the time of appointment were sometimes later curtailed by instructions sent out from London, and a governor might find himself obliged to follow quite a different course from that which he would have chosen. More serious were the restraints flowing from the power of the purse as wielded by the colonial assembly. Endless quarrels of governors and assemblies raged round the use of this power, and by degrees the popular bodies established the right to make and withhold appropriations at pleasure. The governor's measures and requests were often thwarted by the refusal of an assembly to provide funds, and his own personal interests were brought in jeopardy by the right which the legislatures gained to vote or hold back his salary and to fix the amount of it.

From the opening of the eighteenth century onwards, every colony had an elective assembly, variously termed "house of burgesses," "house of commons," and "house of representatives;" and in all except three cases this body formed the lower branch of a legislature whose upper chamber was, as has been observed, the governor's council. In the mother country, no attempt had ever been made to apportion members of the House of Commons in accordance with population, and, as John Locke complained in 1689, petty towns which had fallen into utter decay frequently sent "as many representatives to the grand assembly of lawmakers as a whole county numerous in people and powerful in riches." In the colonies, representation was better provided for, in that it was regu-

lated by general law and was kept in closer relation to the distribution of population; although, here too, such local government areas as happened to exist—often varying widely in population—were used as electoral districts, with provisions for correcting only the most glaring inequalities. In New England, the town was the unit of representation; in the middle and southern colonies, the county, save in South Carolina, where the parish was employed.

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IV

Furthermore, the suffrage was confined to a small fraction of the population. The imperial government left its colonies practically free to fix qualifications for voting as they liked. But the example of the home country—where the county electorate included only substantial landholders and the borough franchise was restricted to the principal tax-payers or to other small groups—was influential; and the well-being of the colony was usually thought to require keeping the suffrage in few and carefully selected hands. Every colony, on the eve of the Revolution, had a property qualification. In five, ownership of personal property sufficed. But in seven, no one could vote unless he owned real estate. In various instances there were also moral, religious, and racial qualifications. As a result, the electorate was, as in the mother country, very small. It has been computed that in Massachusetts and Connecticut only sixteen per cent of the inhabitants were voters; in Rhode Island, nine per cent; in rural Pennsylvania, eight per cent; in the city of Philadelphia, two per cent. On account of the difficulties of travel, the size of many electoral districts, and the absence of party machinery, it often happened, too, that not more than one-sixth, or even one-eighth, of the people who were qualified to vote actually voted.<sup>1</sup> Special property qualifications were usually required of assemblymen, and often some form of religious test besides.

Restrictions on the suffrage

The colonies, said Edmund Burke in 1777, “formed within themselves, either by royal instruction or by royal charter, assemblies so exceedingly resembling a parliament, in all their forms, functions, and powers, that it was impossible they should not imitate some opinion of a similar authority.”<sup>2</sup> Whether in corporate Connecticut and Rhode Island or in provincial Virginia, the assemblies indeed “imbibed” a decided opinion of this sort. Taking advantage of the generally broad, and even vague, provisions of the charters and other fundamental laws, they laid claim to all the powers and privileges of the English House of Commons

Growth of the assemblies' powers

<sup>1</sup> K. H. Porter, *History of Suffrage in the United States*, Chap. i.

<sup>2</sup> Letter to the Sheriffs of Bristol, *Works* (4th ed., Boston, 1871), II, 232.

and declared themselves entitled to enact all kinds of domestic legislation. They had, of course, to reckon with the royal power of veto as exercised through the governor or as brought to bear directly by the crown, sometimes after measures had been on the statute-book for years. But often they were able to nullify a veto's effect by passing a "temporary" act, or a series of such acts, accomplishing the desired purpose. Their claims to financial power brought them into repeated conflicts with the governors. But here again they usually triumphed; indeed, their control over appropriations became a means by which they often wrested concessions from the governor, and from the crown, on non-financial matters. Many times the governor was compelled to disobey or ignore his instructions in order to keep the wheels of government moving. In short, on the eve of the Revolution the assemblies were growing steadily, not only in the spirit of independence, but in actual power; and the experience gained by their members in fighting for what they regarded as their rights became an indispensable asset of the colonies in the new era of conflict.

Arrangements for the administration of justice followed the same general lines in all the colonies, and were modeled closely on English usage. There were commonly three grades of tribunals: the justices of the peace, the county courts, and the courts of appeal. The justices of the peace were usually appointed by the governor, although in some instances they were elected by the freeholders; and their jurisdiction extended only to petty offenses and to civil cases involving small amounts, *e.g.*, less than five pounds in New York and less than forty shillings in Massachusetts. The county courts, whose judges were appointed by the governor,<sup>1</sup> had criminal jurisdiction over all except capital cases and jurisdiction over civil cases involving varying, but relatively large, amounts. In most of the colonies, the court of appeals consisted of the governor and his council. In weighty matters, appeal lay from the courts of appeal to the king in council—in effect, to the Privy Council, which, in lieu of judicial "decisions" (for the body was not a court) advised the king whether to sustain the actions of the colonial tribunals or to reverse them. All of the colonial courts recognized and enforced not only the colonial statutes, but the common law and such acts of Parliament as had been made to apply to America; and English judicial procedure, including trial by jury, was universally adhered to.

<sup>1</sup> Except in New Jersey, where they were elected by the people.

As a colony grew, subdivisions were created to meet the needs of local, or community, government. Here again, forms and usages familiar in the mother country were brought into play. Conditions of life in a frontier world made it necessary, however, to improvise a good many novel features. Furthermore, physical surroundings differed from colony to colony, and more diversity arose in local government arrangements than in other parts of the political system. The people of New England—to speak of them first—settled in compact communities. They could easily live in that fashion and carry on their small-scale farming and their trade; they felt the need of protection against Indian attacks; and they wanted to remain in close fellowship with the religious congregations to which they belonged. The main unit of local government in all of the New England colonies was, therefore, the town. There were counties, but they served only minor uses.

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IVLocal gov-  
ernment

The New England town was not necessarily, or even usually, an urban center. It was, rather, a township, often entirely rural, although likely to contain at least a village. At all events, it was small, and its people could come together easily and frequently for worship, for social intercourse, and for political action. The governing authority was a primary assembly of voters known as the town meeting, which convened at least once a year and made by-laws on various matters, levied taxes, voted appropriations, and elected not only the town's representative (or representatives) in the colonial assembly, but the officers—chiefly a board of "selectmen" of three to thirteen members—who administered the town's affairs during the ensuing twelve months. As a rule, these little governments went along with no interference from the colonial and English authorities, and the experience which the people gained in the management of their affairs, even though on a petty scale, was of inestimable value in the larger era of self-government ushered in by the Revolution.

The New  
England  
town

In the southern colonies, the situation was different. The plantation system prevailing there caused the population to be scattered thinly over wide areas, with the result that the county, and not the town, became the appropriate local government unit. Broadly, the county was organized like its prototype in the home country. There was no popular assembly, and most of the officers—lieutenant, sheriff, coroner, and justices of the peace—were appointed by the governor, commonly on nomination by the justices, who, as in England, were administrative as well as judicial authorities. In the

The  
county

CHAP.  
IVSources of  
political  
ideas in the  
colonies

middle colonies a mixed system of town and county government grew up, but after 1688 the town was gradually overshadowed by the county, especially in Pennsylvania.<sup>1</sup>

Like Englishmen at home, the colonists were, in general, hard-headed, practical men who dealt with questions as they arose and were not much given to political speculation. After 1760, their remonstrances against the attempts of Parliament to legislate for them and to tax them led to much discussion of constitutional theory and political rights. Prior to that time, however, such protests as they found it necessary to voice commonly appealed to the laws and usages of the realm rather than to abstract doctrines. The political views which they held were drawn from a variety of sources. The Puritans and Quakers leaned heavily upon the Scriptures. English treatises—Richard Hooker's *Laws of Ecclesiastical Polity* (circa 1594), Milton's political essays, Harrington's *Commonwealth of Oceana* (1657), and, above all, John Locke's *Two Treatises of Government* (1690) and Algernon Sydney's *Discourses Concerning Government* (1698)—contributed much. In the main, however, the colonists' ideas on political subjects were derived from the existing English constitutional system and the common law, enriched by the results of their own practical experience.

Tendencies  
toward  
democracy

Although the political institutions of the mother country were far from democratic, and notwithstanding that few of the earlier English settlers in America believed in what we nowadays regard as popular government, opinion during the colonial period moved perceptibly, even if grudgingly, in the direction of political democracy. The conditions of life in a new country are invariably favorable to political as well as social democracy. Class lines are drawn less sharply; men are thrown back upon their own efforts and have a chance to win standing and power without regard to birth and connections; smallness of numbers requires coöperation and stimulates solidarity. Local self-government as developed particularly in the New England towns, although not itself as yet democratic, was a necessary stepping-stone to democracy. Vigorous elective assemblies, although not as yet representing the masses, were essential if the masses were ever to rule. The sentiment which

<sup>1</sup> It should be added that the foundations of American municipal government were laid during the colonial period by the incorporation of twenty boroughs under charters conferred by certain governors. New York received the first such charter in 1686. The governing authority of an incorporated borough was, on the English analogy, a single-chamber council consisting of a mayor, a small number of aldermen, and a larger number of councilors. See W. B. Munro, *Government of American Cities* (4th ed.), 21-24.

upheld these bodies in their steady accumulation of power manifested itself in a growing demand for popular election of officers, for shorter terms of office, for more frequent reapportionments of legislative seats, for habeas corpus acts and other guarantees of civil rights, and here and there for a broader suffrage. Meanwhile, the hardy populations which, even before 1750, were spreading through the back-country of New England, New York, Virginia, and the Carolinas were laying the foundations for the eventual triumph of democratic sentiments which we associate particularly with the name of a doughty descendant of these pioneers, Andrew Jackson.<sup>1</sup>

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<sup>1</sup> The influence of the frontier on the political development of America is described clearly in F. J. Turner, "The Significance of the Frontier in American History," *Amer. Hist. Assoc. Report* (1893), 197-227, and in the same author's *The Frontier in American History* (New York, 1920). Cf. B. F. Wright, Jr., "American Democracy and the Frontier," *Yale Rev.*, XX, 349-365 (Winter, 1931).

## CHAPTER V

### THE FIRST STATE AND NATIONAL GOVERNMENTS

Colonial  
autonomy

The colonies were too far away from the mother country to be kept under continuous and effective control. Besides, there was no centralized colonial office to attend to their affairs. As a result, they grew accustomed to doing largely as they pleased. They made their own laws and paid little attention to regulations which Parliament occasionally sought to impose; they paid no taxes to the government across seas; and, except in times of emergency, they provided for their own defense.

Attempts  
at closer  
control  
lead to in-  
dependence

After the French and Indian War, the ministers of George III felt that the time had come to tighten the reins, and it was decided not only to enforce various long-evaded measures concerning trade but also to station British regulars in the colonies, as part of a permanent system of imperial defense, and to ask the colonists to pay taxes to help meet the resulting cost. From the English point of view, this was a reasonable plan. But the colonists did not like it. Now that the French power had been broken, they felt able to go on looking out for their own defense; they abhorred the idea of paying taxes not voted by their own representatives; they recognized no sovereignty except that of the crown, and totally rejected the notion that Parliament had a general right of legislation over them such as it enjoyed in the mother country. Inadequately informed on the state of mind prevailing across the sea, the king's government went ahead with its plans, and when halted by unexpected opposition, merely tried different measures without abandoning the general policy. The upshot was a series of events—familiar to every American schoolboy—which steadily widened the breach until, in April, 1775, debate gave way to action. From the ministers' well-meant but ill-advised decisions flowed the Revolutionary War, the independence of the thirteen colonies, and the establishment of a new trans-Atlantic English-speaking nation.

The  
aristocracy  
and the  
"people"

We are prone to think of the Revolution as only a contest for independence from Great Britain. But it was a good deal more than that. In no small measure, it grew out of deep-seated rivalries

within the colonies themselves between the privileged and well-to-do on the one hand and the "people"—the unenfranchised small freehold farmers, tenants, artisans, and laborers—on the other; and its political results were deeply colored by this circumstance. A great proportion of the privileged folk—landowners, merchants, clergymen, and officials—remained loyal to the British government. If these elements had been able to keep control of what was at first only a dignified protest, with no thought of rebellion, there would have been no separation. Sooner or later, however, they lost their grip in all of the colonies; and the movement which they had helped to start was carried forward by other men, on lines that led, not only to independent nationality, but to the infusion of new elements of democracy into the existing social and political order.

Some of these later leaders were, it is true, men of means and of conservative instincts; one immediately thinks of Washington, reputed the richest man in the colonies. But in the main they and their followers were people of small propertied interests and of limited business experience, with only here and there a figure of the type of Jefferson, who, although a plantation-owner and slaveholder, was inclined to be radical-minded in politics. They were, in general, people who risked little by change; the chances were that they would gain something from it, both socially and politically. They did not stop with arguments for constitutional rights as colonists, or even for independence. Drawing upon the great resources of English liberal thought in the seventeenth century—especially as brought together in the writings of Locke—they turned their minds to the general and universal rights of man, and to the reconstruction of life and government in America in accordance with what were conceived to be such rights. The Declaration of Independence was their handiwork, and it boldly proclaimed, as "self-evident" truths, that all men are created equal; that among the inalienable rights with which men are endowed by the Creator are life, liberty, and the pursuit of happiness; that governments are instituted among men to secure these rights; that governments derive their just powers from the consent of the governed; and that the people have a right to alter or abolish their government whenever it "becomes destructive of these ends"—in other words, a right of revolution. Bills of rights incorporated in new state constitutions freshly proclaimed all powers of government to be derived from the people, and reiterated the familiar principles of the Great Charter, the English Bill of Rights, and other historic

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Radicalism  
in the  
ascendant



pronouncements concerning property, trials, excessive bail, unusual punishments, habeas corpus, freedom of assembly, right of petition, liberty of the press, and other "inalienable" rights. Aristocratic privileges and usages were frowned down or expressly abolished.

Dislike of the alleged tyranny of unwise British ministers and of a misguided Parliament led many people, indeed, to the conclusion that government is hardly better than a necessary evil. Life and property must be protected; social order must be maintained. But this, many decided, was about as far as government ought to be permitted to go. Better run the risk of occasional riots and other disturbances than have too much government. The oft-quoted remark of Jefferson that that government is best which governs least expresses the idea that underlay, not only the Declaration of Independence, but the early constitutions of the states as well; and it is no cause for surprise that, inspired by such a philosophy, the makers of our first national constitution, the Articles of Confederation, planned a system which, in practice, soon broke down because of its inherent weakness. Bitter experience showed that the reaction against government regulation had been carried much too far.<sup>1</sup>

After war broke out, in 1775, many royal governors and other officials left the country, and in one colony after another control of affairs passed into the hands of rump legislatures, specially chosen "conventions," and other more or less irregular bodies. Under these circumstances, the Continental Congress—even before independence was declared—advised that each colony reconstruct its own government on lines deemed most likely to meet its particular needs. Connecticut and Rhode Island found it sufficient to make only a few changes in their charters. But other colonies—or states, as they were now coming to be—required something more, and, by one means or another, all framed and adopted new fundamental laws, or constitutions, Massachusetts closing the list in 1780. Several of the new instruments were drawn up by assemblies chosen with that object more or less definitely in view. Most of them, however, were made and put into operation by bodies selected merely for the general management of affairs, and in only two states—Massachusetts and New Hampshire—were they the handiwork of conventions which confined their labors to this one task. In half a

<sup>1</sup> The political thought of the Revolutionary period is treated more fully in C. E. Merriam, *History of American Political Theories*, Chap. II, and R. G. Gettell, *History of American Political Thought*, Chap. IV. See also B. F. Wright, *Source Book of American Political Theory*, Chaps. II-III.

dozen states, the new constitutions were submitted to a popular vote, though in only two—again Massachusetts and New Hampshire—was ratification by this means made a necessary condition of adoption.<sup>1</sup>

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On the theory that the people had an inherent right to change their form of government at any time through their elected representatives in the legislature or a convention, five states made no provision for amending their constitutions. Georgia and Maryland, however, authorized the legislature to adopt amendments; Delaware and South Carolina provided for amendment either by the legislature or by convention; Pennsylvania, by a council of censors and a convention; Massachusetts and New Hampshire, by a convention called by the legislature. The idea that constitutions should be made and amended by a different agency, and by a different process, from that employed in the making of ordinary laws was not so commonly held as nowadays, and popular ratification of amendments was provided for in only Massachusetts and New Hampshire. Notwithstanding the rather undemocratic, and even irregular, way in which most of these early constitutions were drawn up and put into effect, the majority of them served their purpose, with few changes or none, for as long as fifty or seventy-five years. Massachusetts, indeed, did not give her original constitution a general overhauling until 1918.

Provisions  
for amend-  
ment

Although differing widely in details, these Revolutionary state constitutions, and the governments that functioned under them, had many important features in common. First, the people were regarded as the sole source of authority: the rule of the king was gone; sovereignty had passed to the politically organized populations of the states. Second, the new governments had only such powers as were expressly bestowed upon them. Not only that, but, since it was believed that government by its very nature tends to become oppressive, care was taken to confer only such powers as were strictly necessary and to provide means by which abuses of power could be punished and prevented.

General fea-  
tures of the  
new state  
govern-  
ments

Third, the much-discussed principle of separation of powers was given greater weight than in the colonial governments. "In the government of this commonwealth," ran a stately passage in the Massachusetts constitution, "the legislative department shall never exercise the executive and judicial powers, or either of them; the

Separation  
of powers;  
checks and  
balances

<sup>1</sup> In the case of New Hampshire, the constitution of 1784 is meant—not the provisional instrument of 1776.

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executive shall never exercise the legislative and judicial powers, or either of them; the judiciary shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men." The constitution of Virginia said much the same thing. If, however, the three contemplated branches were to be distinct, they were not to be water-tight compartments. Another principle was regarded with quite as much favor, namely, "checks and balances;" and so vigorously was it brought into play that each department of government, far from being allowed an independent course, was tied up with the others and subjected to various forms of control by them. Particularly was this true in respect to the relations between the executive and legislative branches. Indeed, in the outcome the principle of separation was largely overborne by the preponderant position commonly assigned the legislature.

Private  
rights

Another outstanding feature of the constitutions was the prominence given to guarantees of private rights and liberties. Seven states prefixed "bills of rights" to their constitutions, and in all cases it was made plain that the individuals composing the sovereign people had rights—freedom of speech and of assembly, trial by jury, habeas corpus, etc.—which the agencies of government must at all hazards respect. Many of these rights were firmly embedded in the common law. But most of the states thought it worth while to give them a place also in their written constitution.

Limita-  
tions on  
democracy

Finally, the doctrine of popular sovereignty was not construed to imply full political democracy. On the contrary, it was thought best to restrict the suffrage to men who had some financial interest in the community—practically, therefore, to property-holders. A property qualification for voting was adopted in every state, and in most instances it operated to debar more than half of the adult male population. High property qualifications were set up also for membership in the legislatures, and for office-holding generally.

The  
governor

The governments under the new constitutions rested on a basis different from that of the previous colonial governments, and were actuated by a different spirit. In their outward, structural arrangements, however, they showed comparatively little change. In every case there continued to be a governor, a legislature, a system of courts, and appropriate machinery for local administration. A main objection to the former colonial governments had been the power vested in the governor. That official was now, therefore, shorn of

much of his authority, and in most instances was definitely subordinated to the legislature. Under the new arrangements, he was, indeed, elected by the legislature in all except two or three states; in these he was chosen by the people.<sup>1</sup> In seven states, the term of office was only one year. In Massachusetts alone was a veto power allowed the governor acting independently, although by 1800 four other states revived it.<sup>2</sup> Everywhere the appointing power was shared with a council or with the assembly; and in several instances impeachment was provided as a means of removing an objectionable chief executive.

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On the other hand, the legislature, as a body standing close to the people, was given comparatively large powers. Pennsylvania adhered until 1790 to the one-house form of legislative organization of its colonial days, and Georgia, adopting that form in 1777, kept it until 1789.<sup>3</sup> Elsewhere the bicameral plan went on, with no important change except that the governor's council, in becoming a senate, became elective, its members being chosen—for terms of from two to five years, and by direct vote in all states except Maryland—from either existing or newly-created districts different from the areas in which assemblymen were elected. Elections to the lower house were annual except in South Carolina, where they were biennial.

The legis-  
lature

Structurally, the judicial system underwent practically no change. It was necessary, however, to provide some new mode of choosing the judges formerly named by the crown. In one state, *i.e.*, Georgia, popular election was introduced. The remaining states adopted, in almost equal numbers, two other plans: (1) election by the legislature, and (2) appointment by the governor, either with or without the consent of the council or the senate. New York, however, put the power to appoint in the hands of a committee of four senators. It was only in later times that the state judiciary was placed generally on an elective basis.

The  
Judiciary

The most significant earlier development in relation to the judiciary found no mention in the new constitutions. This was the

Beginnings  
of judicial  
review

<sup>1</sup> It should be noted, however, that even where popular election prevailed it fell to the legislature to elect when no candidate received a majority of all the votes cast.

<sup>2</sup> In Massachusetts, measures could be passed over the governor's veto by a two-thirds vote in both houses of the legislature. In New York, the veto power was shared by the governor and council, and a veto could be similarly overridden in the legislature.

<sup>3</sup> Vermont entered the Union in 1791 with a single-chamber legislature, which it kept until 1836.

right of the courts to inquire into the constitutionality of laws and to refuse to enforce measures held to be unconstitutional.<sup>1</sup> Appeals to the king in council in colonial days had familiarized people with the idea of judicial review, and, notwithstanding that the constitutions were silent on the subject, judges were soon found claiming the power to declare legislation void because in conflict with the constitution under which it was enacted. Virginia and New Jersey courts began to take this authority to themselves in 1778 and 1780, and in the memorable case of *Trevett v. Weeden* a Rhode Island court declined, in 1786, to enforce a statute laying a penalty for refusing to accept paper money at its face value, on the ground that the law was unconstitutional and void.<sup>2</sup> The right of the courts to do this was questioned at the time, and still more after 1789; but they stood their ground. Furthermore, judges in the later federal courts assumed the same power; and judicial review, as a device for keeping legislatures within the bounds presumably marked out for them, became a permanent and distinctive feature of the American plan of government.

The Con-  
tinental  
Congress

It had never been easy for the colonies to work together, and no lasting union was built up among them until the quarrel with the mother country forced them into coöperative relationships in 1774-75. Even then, no strictly political union was attained except such as found expression in a voluntary meeting of delegates known as the Continental Congress. The first such Congress assembled at Philadelphia on September 5, 1774, and sat at intervals until October 26. The second Congress met in the same city on May 10, 1775, and served as the country's sole organ of national government until March, 1781.

Its defects

The Continental Congress was of great service in carrying on the war. It raised armies, appointed generals, managed foreign relations, arranged the French alliance, and in other ways led and served the cause. Even for war purposes, however, the Congress was gravely defective; and as an instrumentality of government it was, in the long run, impossible. In the first place, it had no legal basis. It began as a mere voluntary conference for the discussion

<sup>1</sup> The constitution of Massachusetts authorized the legislature to consult the judges in advance on a proposed measure, but said nothing about action by the judges after the measure was on the statute-book.

<sup>2</sup> For the argument in this case, see J. B. Thayer, *Cases in Constitutional Law*, I, 73-78. Cf. E. S. Corwin, "The Establishment of Judicial Review," *Mich. Law Rev.*, IX, 102-125, 283-316 (Dec., 1910, and Feb., 1911); D. O. Wagner, "Some Antecedents of the American Doctrine of Judicial Review," *Politi. Sci. Quar.*, XL, 561-593 (Dec., 1925).

of grievances and remedies; it, of course, had no sanction in British instructions and regulations; and the national independence which it boldly proclaimed left it no less an extra-legal and revolutionary body than before.

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From this it follows that the Congress had no powers except such as it assumed, or, at the most, such as the people and their governments in the several states informally consented to permit it to exercise. Historians and constitutional lawyers, it is true, are not agreed upon what actually happened when independence was declared. Some consider that the very act of breaking the bonds which united the thirteen colonies with Great Britain threw down the barriers separating them from one another and merged them in one sovereign nation, with the Congress as its legal organ. But there is no evidence that contemporaries viewed the matter in this way. On the contrary, they plainly conceived of the thirteen colonies as having become so many independent, sovereign political areas, *i.e.*, states, in the full meaning of the term. For war purposes, these states did, indeed, maintain certain machinery in common, chiefly the Congress and the armies. Legally, however, each had unrestricted powers of self-government, and was entitled to resume complete independence of action whenever it pleased.

Sovereignty  
of the  
states

Experience soon proved the inadequacy of a simple league on these lines. The war gave promise of lasting many years and of demanding every ounce of strength that the people could muster; finance, commerce, foreign relations, military and naval operations called for management at the hands of a government resting on some legal basis, definitely endowed with powers and assured of some degree of permanence. And out of this practical situation sprang the idea of a real and lasting union of the states—in other words, that spirit of American nationality which gradually broadened and deepened until it found expression in the Articles of Confederation, the constitution of 1789, and ultimately the vast and complicated mechanism of national control which we know to-day as the government of the United States. Notwithstanding the obvious advantages of a closer union, the building of the American nation was, however, a gigantic task. The jealousies and suspicions of colonial times were not dropped when the war broke out, or when independence was secured. Some, on the contrary, were intensified; and many new sources of friction appeared. From whatever point of view considered, the transition from the Continental Congress to the government under the constitution of 1789, accomplished as it

Need of  
a strong  
union

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The Declaration of Independence and the Articles of Confederation

was within the space of hardly a dozen years, was a remarkable achievement.

On June 7, 1776, Richard Henry Lee, of Virginia, introduced in Congress his famous resolution declaring the colonies "free and independent states," and at the same time moved the appointment of a committee to draw up "articles of confederation." Scattered proposals looking in these directions had previously attracted little support. By this time, Congress had, however, come to the point where it could no longer evade or postpone either issue. Hence, on June 11 a committee was appointed to draft a declaration of independence, and on the following day another to draw up a plan for a more substantial union. The result in the one case was the Declaration of Independence, adopted by Congress on July 4; in the other, the preparation of the first constitution of a united America, *i.e.*, the Articles of Confederation.

The Articles ratified

The committee on union found two carefully prepared plans ready for its consideration (one by Franklin and the other by John Dickinson); and on July 12 it was ready to report. The scheme which it submitted bore evidence at every turn of having been framed with a view to persuading the mutually jealous states, especially the smaller ones, that they could enter the proposed union without surrendering powers and rights which they considered essential to their well-being. Even so, the process of adoption was slow and arduous. After a few weeks of discussion, Congress put the project entirely aside until the next spring in order to give the states a chance to consider it. Not until November 15, 1777, did Congress give its approval; and since by its own terms the instrument could not take effect until ratified by every one of the states, other and still longer delays ensued. Eleven states ratified within about a year. But Delaware held back until 1779, and Maryland until 1781. The new plan, therefore, went into operation on March 1, 1781, almost five years after it was framed, and three and one-half years after Congress adopted it. By that time, the war which had called it into being was fast approaching an end.

Continued sovereignty of the states

Under the Articles,<sup>1</sup> the United States had for the first time a government resting on a written constitution and endowed with a reasonably definite body of powers—a government which, it must not be forgotten, was considerably superior to the extra-legal Con-

<sup>1</sup> The text of the Articles will be found in many places, *e.g.*, J. M. Mathews and C. A. Berdahl, *Documents and Readings in American Government*, 29-36.

tinental Congress, even though it, in turn, proved inadequate and was eventually discarded. Three main features characterized it. The first was the complete and unquestioned sovereignty of the states. "Each state," says Article II, "retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled." As we shall see, men differed widely in earlier times on the question of whether the states were sovereign under our present constitution. Under the Articles, however, the situation was never in doubt. The states delegated to the national government the right to exercise certain powers and denied certain powers to themselves. But they retained full sovereignty over their own citizens; the union was only a loose confederation, or league; and, notwithstanding that the Articles spoke of it three times as "perpetual," the members plainly regarded themselves as entitled to withdraw if they desired.

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A second feature was the simplicity, not to say meagerness, of the machinery of government. Entire management of the country's general interests was entrusted to a single-chamber Congress, meeting annually and composed of delegates appointed in each state in whatever way the legislature thereof directed. Each state paid its own delegates, and could recall them and appoint others at any time; and no person could serve more than three years in any six. A state might send any number of delegates from two to seven. But voting, as in the Continental Congress, was by states, and each state had one vote. Whatever functions and powers the national government possessed were gathered in the hands of this one body; separation of powers, though deemed essential in the states, here found no place. Committees of Congress might, of course, be set up, and subordinate officers appointed. But there was no executive branch, and also no national judiciary.

The  
Congress

The functions and powers of the national government were, therefore, nothing more nor less than the functions and powers of Congress; and a third feature of the system was the rigid limits placed upon these powers. In the main, the powers conferred looked, not to law-making, but only to general direction or management of the country's affairs, on executive and administrative lines. Thus, Congress was to manage foreign relations, declare and conduct war on land and sea, build and equip a navy, carry on dealings with the Indian tribes, borrow money, emit bills of credit, regulate weights and measures, and issue requisitions upon the states for soldiers

Powers and  
limitations



and for funds. It could not, however, reach down past the state governments to control the people in any effective way. It had no power to tax, but could only call upon the states for funds, in proportion to land values, leaving it to the states to raise the money in any way they chose. It could not lay tariff duties or otherwise regulate commerce (except with the Indian tribes). It could pass resolutions, but it had no authority to make law, in the sense of regulations backed up with a power of enforcement. There were no courts, except those of the states, through which it could compel respect for its commands. To cap the situation, some of the most important powers conferred could be exercised only conditionally, *i.e.*, only if the delegations from as many as nine states concurred. No treaty could be made, no money borrowed, no money appropriated, except under this rigorous limitation.

Achievements of the new government

With all their manifest weaknesses, the Articles finally went into effect on March 1, 1781. Momentarily, there was improvement. The new Congress, while not a distinguished body, was superior to its predecessor, and it addressed itself courageously to the performance of its difficult tasks. Taking over a plan worked out by the preceding Congress in its expiring moments, it provided for four executive officers, or heads of departments—a superintendent of finance, a secretary of foreign affairs, a secretary “at war,” and a secretary of marine; and, though handicapped by lack of funds and of powers, these agencies did some good work and became the prototypes of the ten great executive departments at Washington to-day. In the teeth of grave obstacles, the new government kept the armies equipped and in the field until peace was assured. It sent astute commissioners who procured from Great Britain full recognition of American independence and beat the double-faced diplomats of France and Spain at their own game. It took up the question of organizing and developing the territories west of the Alleghenies, and adopted principles and measures which underlie the governmental and educational systems of that part of the country to-day.<sup>1</sup> It held the thirteen jealous states together while the people were gradually being brought by hard experience to see that what they needed was more union rather than less, or, as some had thought, none at all.

Need of money

Notwithstanding these achievements, the basic defects of the new frame of government quickly produced distressing results. Four main difficulties appeared. The first was the lack of power to

<sup>1</sup> Notably the Northwest Ordinance of 1787.

raise money. The amounts needed would seem small to-day, but they were staggeringly large for the time. Interest payments on borrowings for the prosecution of the war were in arrears; officers and soldiers, who in many cases had received nothing for their services except certificates of indebtedness, were clamoring for their pay; a new army was needed to repel possible British or Spanish attacks and to hold the Indians in check, and a navy to protect commerce from the depredations of the Barbary pirates; the current expenses of the new government must, of course, be provided for.

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Congress had only two ways of obtaining funds, namely, by borrowing and by making requisitions on the states. The possibilities in the first direction had already been pretty well exhausted—although optimistic Dutch bankers continued to make small loans which quite possibly saved the country from utter bankruptcy. Requisitions upon the states were likewise a hazardous resource. Congress could apportion sums and request remittances, but it had no way of compelling a state to turn over a penny. There was widespread objection to the basis of apportionment; people disliked sending off the proceeds of local taxation to a distant government; and one state naturally hesitated to meet obligations in full while others were shirking them.

Difficulty  
of obtain-  
ing it

The result was that, after a brief period, some states fell into the habit of contributing hardly anything, others paid irregularly, and only two or three—chiefly New York and Pennsylvania—made any real effort to come forward with all that was asked of them. In February, 1781, even before the Articles went into effect, Congress asked the states for the power to levy a five per cent import duty. Rhode Island, however, was unwilling, and the proposal failed. Again in 1783 permission was sought to levy certain duties, the proceeds of which were to be applied exclusively to the public debt. But in three years only nine states gave their consent; and a fresh appeal in 1786 failed to win New York. Nothing was to be gained by issuing paper money. The country was already flooded with paper promises to pay, issued as an aid to financing the war, and this “continental currency” had sunk so low in value that by 1781 practically the only people willing to accept it were speculators, who bought and sold it in bundles at rates varying from five hundred to one thousand dollars in paper for one dollar in gold.

Relief  
measures  
defeated

A second main difficulty was the lack of power to regulate commerce. Congress was permitted by the Articles, it is true, to regulate

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VInability  
to regulate  
commerce

trade with the Indian tribes and to conclude treaties of commerce with foreign nations. But it had no power to control commerce between the states; it could not lay duties on exports or imports; and it was bound to allow the states to lay duties, and even to prohibit the exportation or importation of goods, as they severally desired. The consequences were disastrous. No money could be raised from tariff duties; no uniform commercial policy could be adopted; and the states laid duties, conferred privileges, and set up barriers as their own immediate interests dictated, sacrificing by their jealousies and bickerings splendid opportunities for the advancement of the country's general trade and wealth. Enmeshed in a network of duties and tolls, trade languished; healthy commercial competition gave way to downright commercial warfare.

A govern-  
ment of  
states and  
not of men

Lack of power to raise money by taxation and to regulate commerce on uniform lines would alone have been enough to insure the failure of the new government. Coupled with these obstacles were, however, two further fundamental weaknesses, already mentioned: (1) the government of the Confederation rested upon the states and not upon the people, and (2) it was wholly without power to enforce its authority, even upon the states. From the first circumstance flowed many unhappy results, in addition to inability to lay and collect taxes. Congress could not make laws and enforce them upon the people; it could only pass resolutions, advise and admonish the state authorities, and trust that such agencies would see fit to carry out its desires. It had no power to raise armed forces independently, even when, as during the Shays rebellion in Massachusetts in 1786, the new order was gravely imperilled.

State in-  
fractions  
of the  
Articles

Equally serious was the lack of power to compel the states to live up to their obligations. Not only did they frequently fail to comply with requisitions for money and for armed forces, but some of them freely violated the Articles by making treaties with Indian tribes, by entering into alliances among themselves without the assent of Congress, by ignoring obligations created by treaties negotiated by Congress, by (in effect) regulating the value of money by making their paper issues legal tender. Congress was powerless to prevent these infractions by military, judicial, or other means, and its moral authority carried little weight.

Early pro-  
posals for  
a revision  
of the  
Articles

Even before the Articles took effect, men who had the country's welfare at heart felt that a government so devoid of power could not succeed. The most they could hope for was that a brief trial of the new plan would convince the people of its inadequacy and

would lead to the stronger system from which the states at present drew back. In 1780, Hamilton, in a remarkable letter addressed to James Duane, lucidly discussed the Articles' faults and proposed that a convention be called to prepare a frame of government providing for a "solid coercive union."<sup>1</sup> Washington, Madison, Jay, Pelatiah Webster, and other leaders repeatedly predicted that the powers conferred would have to be enlarged.

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A few years of experience showed that the critics were right, and the idea of a convention steadily grew. Every effort to amend the Articles by simple agreement having been blocked, Congress itself, in 1784, began to talk about a convention; and in the following year the Massachusetts General Court formally requested that a call be issued, although the state's representatives in Congress refused to present the resolution. Matters were fast going from bad to worse, and in 1786 Congress, in making a final appeal for a long-pending amendment conferring power to lay import duties, frankly told the people of the states that the government was at the end of its tether and that only immediate action could save the country from ruin. "A crisis has arrived," it was solemnly asserted, "when the people of the United States, by whose will and for whose benefit the federal government was instituted, must decide whether they will support their rank as a nation by maintaining the public faith at home and abroad, or whether, for the want of a timely exertion in establishing a general revenue and thereby giving strength to the Confederacy, they will hazard not only the existence of the Union but of those great and invaluable privileges for which they have so arduously and so honorably contended."

Consideration of the matter in Congress

Meanwhile a chain of events started which led, more or less accidentally, to the long-talked-about convention. From as far back as 1777, Virginia and Maryland had been trying to arrive at an understanding concerning the navigation of the Potomac. Washington and Madison were especially interested in the matter, and at their instigation Virginia appointed commissioners in 1784 to renew the negotiations. Maryland took similar action in 1785, and the desired agreement was promptly reached. Maryland thereupon suggested that other issues between the two states be taken up. If navigation questions could be settled by conference, why not tariff difficulties? Furthermore, if two states could confer to advantage, why not four—especially in view of the fact that Pennsylvania and

Virginia and Maryland negotiate on the navigation of the Potomac

<sup>1</sup> *Works* (Lodge's ed.), I, 213-239.

Delaware were vitally concerned with most of the problems to be considered? The upshot was that, in January, 1786, Madison got through the Virginia legislature a resolution appointing commissioners to meet such commissioners as might be appointed by any other states to confer upon the condition of the country's trade and "to consider how far a uniform system in their commercial regulations may be necessary to their permanent harmony."<sup>1</sup> A formal invitation was thereupon issued to all of the states to send delegates to a convention to be held at Annapolis in the following September.

The  
Annapolis  
convention  
(1786)

At the designated time, representatives appeared from only five states. Four others had, indeed, appointed delegates, who failed to attend; four states took no notice of the call. This was a discouraging showing, and the persons present agreed that it would not be worth while to go ahead with the discussions planned. Some felt that the project might as well be dropped. Madison and Hamilton, however, thought otherwise, and before disbanding the delegates unanimously adopted a report prepared by the latter calling attention afresh to the critical situation of the country and proposing that delegates from all of the states should meet at Philadelphia on the second Monday of May, 1787. The purpose in mind, furthermore, was no longer merely to promote agreement on commercial regulations. The gathering would be expected, rather, "to take into consideration the situation of the United States," with a view to such changes of all kinds as would make the governmental system more adequate. As to how sweeping these changes would probably have to be, the report was discreetly silent.

The Phila-  
delphia  
convention  
called

By this time, Congress was grasping at straws; and on February 21, 1787, it resolved that the proposed convention should be held "for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the states, render the federal constitution adequate to the exigencies of government and the preservation of the Union."<sup>2</sup> Congress had itself fallen into disrepute. But the activities of Washington, Madison, Hamilton, Franklin, and others in behalf of the plan gave it weight, and all of the states except Rhode Island eventually followed Virginia's example

<sup>1</sup> *Writings of Madison* (Hunt's ed.), II, 218.

<sup>2</sup> J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington, 1854), I, 120.

and named delegates, although New Hampshire failed to act until the convention was well under way. In some cases the legislatures elected, in others they authorized the governors to appoint; in no instance were the delegates chosen directly by the people. Little or nothing was said about making a new constitution. The instructions given the delegates plainly assumed that nothing would be done beyond revising the Articles; indeed, in most instances they expressly limited the delegates' powers to this task, and Delaware went so far as to forbid her representatives to agree to any proposal that would take away the equal votes of the states. If any persons expected a new constitution to be made—and probably some did so—they discreetly kept their hopes to themselves, lest apprehensions be aroused and the project ruined. Nevertheless, most observers must have felt, with Madison, that unless "some very strong props" were applied, the existing union would "quickly tumble to the ground."

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## CHAPTER VI

### THE MAKING OF THE CONSTITUTION

Member-  
ship of the  
Constitu-  
tional  
Convention

The convention was announced to meet on the second Monday of May. When that day arrived, however, only a few delegates had reached Philadelphia, and since it was useless to begin until a majority of the states were represented, the opening session did not take place until May 25. Much has been written to the general effect that the convention brought together a remarkable group of men; and there is no denying that it did so. Taken as a whole, the body was notable, however, not for a uniformly high level of statesmanlike ability, but rather for its essential solidarity of opinion, arising from the fact that, with few exceptions, its members were drawn from the professional and propertied classes, and, while differing widely as to means and methods, had as a common objective the social and political stability which those classes instinctively and universally crave. Representatives of the debtor, small-farming, and mechanic classes were conspicuously absent. There were members of exceptional political sagacity: Washington and Madison of Virginia,<sup>1</sup> Franklin and Wilson of Pennsylvania, Alexander Hamilton of New York, John Dickinson of Delaware, Oliver Ellsworth of Connecticut. There were delegates of fair, but not exceptional, ability: Rufus King of Massachusetts, Gouverneur Morris of Pennsylvania, William Paterson of New Jersey, Edmund Randolph of Virginia, the two Pinckneys of South Carolina. And there were a few members of narrow vision and limited talent: Lansing and Yates of New York, and Luther Martin of Maryland. Lawyers predominated; and several of the delegates were reasonably well acquainted, not only with the history of English law and politics, but with the governmental systems of Continental Europe. Men of age and maturity were present, notably Franklin, who was almost eighty-two. But a large proportion of the most active and influential delegates were decidedly young: Madison, the master-builder, was thirty-six, Gouverneur Morris was thirty-five, Hamilton was but thirty.

<sup>1</sup> Jefferson was on a diplomatic mission in Europe; otherwise he undoubtedly would have been a member.



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VIExperience  
and temper  
of the  
delegatesOrganiza-  
tion and  
procedure

Aside from deep conviction of the importance of the task assigned it, the convention's chief qualification for its labors lay, however, in the fact that almost without exception its members were experienced in public affairs. Practically all of them had been active in the politics of their respective states. Many had helped frame constitutions, sat as members of legislatures, or held executive or judicial offices. Several had been members of Congress. At the same time, it is to be observed that they were not the radicals who had led in bringing on the Revolution and in declaring independence. Patrick Henry was not there (though he had a chance to go), nor was Samuel Adams. The men who now held the country's political destinies in their hands were not of the doctrinaire type. Rather, they were hard-headed, practical-minded people—men, in the main (as has been indicated) of property, and naturally of the conservative temper that usually goes with the possession of property. Few were as conservative as Hamilton, who wanted to see a highly centralized and somewhat aristocratic republic set up. But few, also, were democrats in any literal sense of the term. Distrust of political democracy, born of a decade of agrarian-debtor control in the local politics of many sections, left, indeed, a deep impress on the constitution as it came from the convention's hands.<sup>1</sup>

The sessions were held in the old brick State House in Philadelphia, probably in a room directly above that in which the Declaration of Independence was signed. Seventy-three delegates, in all, were appointed, but only fifty-five ever attended; of these, some were present only part of the time, and the average attendance seems to have been not above thirty or thirty-five. At the opening meeting, Washington was unanimously chosen to preside. This prevented him from taking an active part in the debates. Indeed, so far as is known, he addressed the convention only twice, on the first and last days of the meeting. With the possible exception of Franklin, he, however, was less dependent on oratory as a means of influence than was any other member. He performed his duties as moderator in a manner to allay strife, and in private conversation and informal conference his opinions and advice were always to be had.

The convention had full power to make its own rules. It promptly decided to adhere to the plan of voting by states, each

<sup>1</sup> The members are characterized briefly, one by one, in M. Farrand, *The Framing of the Constitution*, Chap. II, and their economic interests and political ideas are described in C. A. Beard, *Economic Interpretation of the Constitution*, 74-149, 189-216.

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state having one vote, as in Congress; and also to protect the members from outside criticism and pressure by sitting behind closed doors, and by allowing nothing that was said to be printed or otherwise made public until its work was finished. A secretary was appointed, and a journal was kept. When, however, in 1818, this record was printed by order of Congress, it proved to be only a bare enumeration of formal motions and of the votes by states.<sup>1</sup> Happily, one member, sensing the importance of what was being done, planned to keep a record of his own. This was Madison. Fragmentary memoranda were left by a few other members, and something can be learned from letters written by certain delegates to their friends. But what we know to-day about the convention's discussions, as distinguished from its formal actions, comes mainly from the "Notes" laboriously compiled by the methodical Virginian.<sup>2</sup>

Deliberations had not gone far before the delegates were brought face to face with a very vital question. Should they merely revise the Articles of Confederation, or should they make a new constitution? There was no getting away from the fact that their instructions looked simply to revision, or from the suspicion that the proposal for a convention would have failed had the people of the states suspected that more drastic action would be taken. On the other hand, many thoughtful persons sympathized with Washington when he confessed the hope that the convention would "adopt no temporizing expedients," but would "probe the defects of the constitution [*i.e.*, the Articles] to the bottom and provide a radical cure, whether they are agreed to or not."<sup>3</sup> Both points of view were strongly represented in the convention, and a plan based on each was early presented for consideration.

The convention's  
main  
problem

The first scheme to appear came logically from Virginia. That state had taken the initiative in causing the convention to be held, and its delegates felt themselves under a certain obligation to have a concrete project ready for discussion. The delay in the assembling of a quorum gave them an opportunity to meet together for some days, and it was in these conferences that the "Virginia plan" first took definite form. Madison was its real author (although

The  
Virginia  
plan

<sup>1</sup> For the Journal, see *Documentary History of the Constitution*, I, 48-308.

<sup>2</sup> First published in 1840. Of several editions, the best are G. Hunt [ed.], *Writings of James Madison* (New York, 1900-10), III-IV, and G. Hunt and J. B. Scott [eds.], *The Debates in the Federal Convention of 1787 which Framed the Constitution of the United States of America* (Internat. ed., New York, 1920).

<sup>3</sup> *Writings of Washington* (Ford's ed.), XI, 134.

Edmund Randolph presented it to the convention), and it represented the best thought of the convention's ablest student of political, and especially federal, institutions. The plan did not explicitly repudiate the Articles. But it looked to a general reconstruction of the system of government for which they provided, and the fiction that a mere revision was intended was soon dropped. A national executive was to be established, and also a national judiciary. There was to be a legislature in two branches, the members of the first branch being chosen by the people of the several states and the members of the second being selected by those of the first from persons nominated by the state legislatures. Voting was to be proportioned in both houses, either to the money contributions of the states or to the number of their free inhabitants, or to both. The powers of this reconstructed Congress were to be increased, and the national government was to have the right to veto state legislation when considered contrary to the Articles or to a treaty, and to call forth the militia against any member of the union "failing to fulfill its duty." Presented by Randolph on May 29, in the form of fifteen resolutions, this plan gave the convention something to go to work on at once; and for two weeks the delegates, sitting in committee of the whole, discussed it with zest.<sup>1</sup>

The New  
Jersey  
plan

The Virginia plan looked to a greater change in the machinery of the general government than in its powers. Nevertheless it provided for a substantial increase of powers; and it proposed to substitute proportional for equal voting in Congress. Strong objection therefore arose from members who were particularly sensitive about the "rights" of their states; and when the larger part of the plan was tentatively voted in committee of the whole, these elements decided to present a counter-plan based on a "purely federal" principle. This alternative scheme, embodied in nine resolutions, was laid before the convention on June 15 by William Paterson, of New Jersey. Far from discarding the Articles, as the Virginia plan in effect did, the New Jersey plan looked merely to such amendment of them as would serve to remedy the most glaring defects of the existing system. There was to be an executive in the form of a council chosen by Congress, and a national judiciary consisting of a "supreme tribunal." Congress was to have power to raise money from duties on imports and from stamp

<sup>1</sup> On the same day on which the Virginia plan was presented, Charles Pinckney, of South Carolina, offered a plan of his own. It was rather similar to the Virginia scheme, and was not discussed in detail by the convention.

taxes, and to regulate commerce; and its acts were to be "the supreme law of the respective states." But the equality of the states was to be scrupulously preserved. Congress was still to consist of a single house, in which each state should have one vote.

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The New Jersey plan was advocated ably by Paterson and other members, and it enlisted the support of about half of the states. Its appearance, indeed, split the convention into two distinct parties, one representing the large states and the other the small states. One group wanted political power proportioned to the ability of the states to aid in bearing the public burdens, and was not afraid of a real national government; the other held that the states, as sovereigns, were equals, and argued that if the small states gave up their present equal voice in public affairs they would become totally subordinated to their more populous neighbors. Fortunately, it was not necessary that either party have its way completely; otherwise, no conclusions could ever have been arrived at. The delegates were, after all, practical-minded patriots, accustomed in their business relations and in their home politics to the saving principle of give and take. They set forth their widely differing views on the floor of the convention freely and sometimes acrimoniously. But, having done so, most of them were not unwilling to compromise; and the constitution upon which they finally came together was, clause after clause, a product of mutual concession.

Compromise the  
only  
solution

Fortunately, however, the delegates were essentially agreed on matters of decidedly larger significance than those on which they differed,<sup>1</sup> and compromise was resorted to only after certain vital decisions had been reached. The most important of these was to cast aside the Articles and to establish a government resting on a more truly national basis. Some delegates were of the opinion that the instructions given by the states were binding, and that if the convention wanted to go beyond the simple revision of the Articles, its members ought to go back to their states and ask for such authority. But the majority were, as Randolph later put it, "not scrupulous on the point of power," and felt, as he further testified, that "when the salvation of the republic was at stake it would be treason to our trust not to propose what we found necessary."<sup>2</sup> Within five days after the convention began work, a resolution was

Decision  
in favor of  
a strong  
national  
government

<sup>1</sup> This oft-overlooked fact is brought out forcefully in R. L. Schuyler, *The Constitution of the United States* (New York, 1923).

<sup>2</sup> J. Elliot, *Debates*, V, 197.

adopted in committee of the whole "that a national government ought to be established consisting of a supreme legislative, executive, and judiciary;"<sup>1</sup> and Madison, Hamilton, and other delegates made it perfectly clear that this meant a government embodying one supreme power, with "complete and compulsive operation." The small-state elements protested, and declared that they would have no part in such a union; the large-state delegates asserted that they would accept nothing less. The small-state people, as we have seen, brought forward the New Jersey plan; yet at the final test only three states voted for it. From first to last—sometimes at grave risk of breaking up the deliberations—the initial determination was wisely adhered to. The time for compromise had not yet come.

From this key decision flowed, also, certain great corollaries: (1) the powers of the general government should be decidedly increased; (2) the machinery of government should be enlarged, as indeed was proposed in all of the plans; (3) the general government, equally with the state governments, should operate directly on the people, through its own laws, administrative officers, and courts; and (4) the new constitution should be "the supreme law of the land," enforceable in the courts like any other law and paramount over all other constitutions, laws, and actions, national or state. All of these were momentous principles, and all lie to this day at the basis of our governmental system.

The  
national  
govern-  
ment  
to be a  
"govern-  
ment of  
men"

Adoption of the third principle, in particular, quite transformed the character of the national government. Instead of resting almost solely upon the semi-independent states, and having little control over the people except through the medium of the state authorities, that government now became a government of a single body politic, with power to levy and collect taxes and to make and enforce laws by its own direct action. Henceforth, as James Wilson pointed out to the convention, over each citizen there were to be two governments, both "derived from the people," both "meant for the people," and both operating by an independent authority upon the people. It was this aspect of the new system, as Madison subsequently explained in a letter to Jefferson, that made it possible to leave out of the constitution any provision authorizing the national government to call forth the armed forces against a delinquent state.<sup>2</sup> In one form or another, every plan presented to the convention had contemplated coercion of delinquent states. But

<sup>1</sup> *Ibid.*, V, 134.

<sup>2</sup> *Madison's Letters* (ed. of 1865), I, 344.

when it was decided to create a central government that would have power to proceed directly against individual citizens, it was perceived that this opened a way to the desired end through the simple enforcement of law, and made unnecessary a very difficult decision on the form which state coercion should take. Thus it came about that the Civil War was waged on the theory that the object was to suppress rebellion on the part of citizens, not of states as such; although the distinction was largely lost sight of in the era of Reconstruction.

These fundamentals settled, the large-state party was prepared to make concessions. The first and most notable one related to voting power in Congress. The large states wanted representation and voting power according to population; the small states demanded equality in voting; spokesmen of each group threatened more than once to withdraw unless their wishes were met. At a very critical point in the proceedings, the delegates from Connecticut—a middle-sized state firmly attached to the idea of a stronger union—brought forward a proposal for equal representation in the upper house, combined with representation on a proportional basis in the lower house; and after heated debates the deadlock was broken and the compromise adopted. This eminently sensible disposition of the matter was casually suggested early in the session and did not originate with the Connecticut delegation. Dr. Johnson and his colleagues deserve credit, however, for putting it formally before the convention with an array of unanswerable arguments; and the agreement has ever since been known as the “Connecticut compromise.” It removed the greatest single obstacle to harmony.

The decision in favor of proportionate representation in the lower house, however, made it necessary to determine how population should be computed. The difficulty at this point was caused by the slaves. Should they be regarded as persons or as chattels? If the one, they ought to be counted in; if the other, they ought to be left out. With a view to increasing their quotas in Congress, the southern states naturally wanted the slaves counted; the northern and middle states, having few slaves, quite as naturally wanted them omitted; and much lively discussion ensued. A possible solution was, however, already in men’s minds when the convention met. When asking the states for additional funds in 1783, Congress had proposed to change the basis of apportionment from land values to numbers of population, so computed as to include three-fifths of the slaves. This “federal ratio” was early added

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The great  
compromises:

1. The  
“Connecticut  
compromise”

2. The  
three-fifths  
clause

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as an amendment to the Virginia plan; it found a place in the New Jersey scheme; and, notwithstanding individual differences of opinion, it was ultimately adopted by the convention as being, in the words of Rufus King, "the language of all America." There was no defense for it in logic. But it was the closest approach to a generally satisfactory arrangement that a body of practical-minded men could discover. The slave states received less representation than they thought their due. They found compensation, however, in the provision that direct taxes laid by Congress should be apportioned on the same reduced basis as representation—although, in point of fact, direct taxes were actually imposed by the national government only three times before slavery was abolished.

## 3. Commerce and the slave trade

Still another compromise pertained to the powers of Congress over commerce. The states north of the Potomac had large commercial interests, and, having suffered most from the commercial anarchy of the Confederation period, they wanted Congress to have full power to regulate trade and navigation. The four states farther south, however, were agricultural, and their delegates feared that Congress would levy export duties on southern products and in other ways discriminate against the non-commercial section. Furthermore, there was the question of the slave trade. The northern states would have been willing to see the traffic abolished immediately, and Maryland and Virginia, being well stocked, had no great interest in it. But Georgia and the Carolinas wanted it to continue, and the convention was told firmly that these states would never accept the new plan "unless their right to import slaves be untouched." The upshot was an agreement which placated all elements. Congress was to have broad powers to regulate navigation and foreign trade, including power to lay duties on imports. But duties on exports were forbidden, and the importation of slaves was not to be interfered with by the national government (except to the extent of a head-tax not exceeding ten dollars) prior to the year 1808.

## The instrument completed

Many other important matters claimed the attention of the delegates through the sultry mid-summer days during which the convention patiently pursued its labors. The nature and powers, and especially the mode of selection, of the executive absorbed much time and thought, the more by reason of the fact that plans gradually took form for a chief executive different from any that the world had ever known. The manner of electing senators—whether by the people, by the state legislatures, or by some agency spe-

cially devised for the purpose—proved very difficult to decide. The appointment and status of the national judiciary provoked ardent discussion. The miscellaneous powers to be vested in Congress, the mode of admitting new states, the control of the national government over state militia, the manner of amending the new constitution—these and a score of other matters required painstaking consideration. From first to last, the Virginia plan, and proposed amendments, formed the chief basis of discussion. First, the essentials of this plan, as embodied in the Randolph resolutions, were threshed out in committee of the whole. Then, after being reported back to the convention considerably altered, they were again debated in full. Next, the growing document was turned over, near the close of July, to a committee of detail, which worked it into a balanced constitutional text; and the convention spent upwards of six weeks more in discussing this draft. Finally, Gouverneur Morris wrote out with his own hand the completed fundamental law, putting it into the lucid English for which it has ever been notable among great documents; and on September 17, thirty-nine members signed it.<sup>1</sup>

The real test was yet to come. The convention had ignored the instructions given most of its members, and, instead of patching up the Articles, had prepared a new and very different scheme of government. Would the people of the states approve what it had done? Even the delegates were not very enthusiastic over their handiwork. Three of those who were present when the document was signed refused to put their names to it. Of twelve who were absent, some hastened to their homes to take up the fight against ratification. Few, if any, were entirely satisfied: Franklin was optimistic, yet fearful; Hamilton admitted that he signed mainly because he felt that the new frame of government could not possibly prove worse than the existing one.

In laying the results of its labors before Congress, the convention made two significant recommendations: (1) that in each state the proposed constitution be submitted to a convention chosen by the people, and (2) that steps be taken to put it into effect whenever as many as nine states should have approved it.<sup>2</sup> The object of the first proposal was, as Hamilton explained, to give

Plans for  
ratifica-  
tion

<sup>1</sup> The monumental collection of sources on the work of the convention is M. Farrand, *The Records of the Federal Convention*, 3 vols. (New Haven, 1911). The best general account is the same writer's *The Framing of the Constitution of the United States* (New Haven, 1913).

<sup>2</sup> J. Elliot, *Debates*, V, 541.



the instrument a more popular basis than it would have if ratified merely by the state legislatures.<sup>1</sup> The aim of the second was, of course, to enable the new system to go into operation when endorsed by a good working majority of the states, without waiting for the unanimity which it had taken three and a half years to obtain in the case of the Articles. Both suggestions were accepted readily, and on September 28 the constitution was transmitted to the states for action.

Principal  
objections  
raised

The controversies that had stirred the convention were now brought home to the people; from New England to Georgia, the new frame of government was seized upon and discussed, dissected, explained, praised, denounced. Objections arose in many quarters. There were men who, like Patrick Henry and Samuel Adams, were so imbued with the doctrines of liberty that they took instant offense at any proposal looking toward a centralization of authority. On the other hand, some people thought that the new plan did not provide for as much centralization as was needed. The paper-money elements were aroused by the clause which forbade the states to issue bills of credit. Many people in the North considered that too much was conceded to the slave-holding interests; many in the South felt that these interests had been dealt with unfairly. Large inland elements—small farmers, backwoodsmen, pioneers—feared the effects of the commercial powers given to Congress; men of property, although generally favorable, wondered how freely the new taxing powers would be used.<sup>2</sup> Everywhere the complaint was made, and justly, that the document failed to take any notice of those fundamental rights and liberties—freedom of speech, freedom of the press, freedom of assembly, right of petition, and religious liberty—which had been so carefully guaranteed in the bills of rights prefixed to most of the state constitutions.<sup>3</sup> No single group of objectors could have prevailed single-handed, but in most states the various groups tended to merge into an opposition extremely difficult to convert or to overcome. The advocates of the new plan gained the name of Federalists; the opponents

<sup>1</sup> *The Federalist*, No. XXII (Lodge's ed., 135).

<sup>2</sup> On the controlling influence of the professional and propertied classes in adopting, as well as framing, the constitution, see C. A. Beard, *Economic Interpretation of the Constitution*, cited above, and O. G. Libby, *Geographical Distribution of the Vote of the Thirteen States on the Federal Constitution* (Madison, 1894).

<sup>3</sup> For contemporary writings voicing the arguments of the constitution's opponents, see P. L. Ford, *Pamphlets on the Constitution of the United States, Published during its Discussion by the People, 1787-1788* (Brooklyn, 1888).

were called Anti-Federalists. Though not organized nationally, both developed a good many of the characteristics of political parties.

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In the Philadelphia convention, the most determined opposition had come from the small states. The conclusions reached there were, however, on the whole favorable to these states, which accordingly became the first to ratify. Delaware "came under the federal roof," on December 7, 1787; New Jersey, on December 18; Georgia, on January 2, 1788, and Connecticut one week later. Pennsylvania, although a large state, was centrally located and federally inclined, and its convention ratified early, *i.e.*, December 12. This rapid pace, however, could not be maintained. In Massachusetts, Virginia, New York, and other states, time was required to rally support; and while there was never much doubt that as many as nine states would eventually ratify, there was grave danger lest some state which, because of its location and general importance, was indispensable to the proposed union would remain obdurate. By cleverly appeasing Samuel Adams and John Hancock, to whom the Anti-Federalists of the interior looked for leadership, the supporters of the new system won in Massachusetts, February 7, 1788, although by a close vote, and only after agreeing to a series of suggested amendments aimed at reducing the power of the central government. Between April and June, Maryland, South Carolina, and New Hampshire followed, each after a hard contest. This brought up the number to the required nine. But no one supposed that the new government could be inaugurated successfully on this minimum basis. Even after Virginia, following an exceptionally bitter fight in which Patrick Henry led the irreconcilables, gave a favorable decision, the battle was but half won; New York was still outside, and New York was a pivotal state without which the union would be a mere caricature.

Ratifica-  
tion by  
nine states

Moreover, the opposition in New York, especially in the rural sections, was very formidable. Appreciating this fact, the friends of the constitution made a special effort before the state convention met to convince the people that the instrument was a moderate, safe, workable plan of government. The most active champion was Hamilton, who conceived the idea of printing in the leading newspapers of the state a systematic exposition in the form of a series of brief public letters, and who associated with himself for the purpose another able New York Federalist, John Jay, and also the most convincing expounder outside of New York, namely,

Ratifica-  
tion in  
New York:  
*The Fed-  
eralist*

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Madison. The result was the remarkable group of papers, eighty-five in number, known to students of American history from that day to this as *The Federalist*. These papers were signed "Publius," and in a few cases it is impossible to tell which of the three contributors was the author. But Hamilton is known to have written upwards of sixty, Madison about fifteen, and Jay a half-dozen. A few were written by Hamilton and Madison jointly. The letters were prepared in haste and published, at the rate of three or four a week, as campaign documents. But their authors were full of their subject and knew how to write, and, taken as a group, these papers have never been surpassed as examples of lucid, direct, and convincing exposition. Gathered in book form even before the series was finished, the collection has passed through more than thirty editions.<sup>1</sup> Better than anything else, it shows what the constitution meant to the men who made it.

The constitution put into effect

Whether because they were won over by "Publius" or because they were unwilling to see their state remain out of the union after all but two of the others had joined, the members of the New York convention finally ratified, on July 26, although by a margin of only three votes. Meanwhile, on July 2, it was officially announced in Congress that the ninth state had ratified, and attention was turned to preparations for putting the new government into operation. The states were called upon to choose presidential electors, senators, and congressmen, and New York City was selected as the temporary seat of government. Then the old Congress, expiring prematurely for lack of a quorum, disappeared, leaving the field clear for its successor. The new House of Representatives was organized on April 2, 1789; the Senate came together three days later; and on April 30, Washington took the oath of office as president. Seven months afterwards, North Carolina, won over by the decision of Congress to submit a bill of rights in the form of ten constitutional amendments, ratified the new fundamental law; and similar action by Rhode Island in the spring of 1790 made the union complete.<sup>2</sup>

Characteristics of the document

"This paper," wrote Robert Morris in commending the constitution to a friend, "has been the subject of infinite investigation,

<sup>1</sup> The title of the first edition was *The Federalist; a Collection of Essays Written in Favor of the New Constitution* (New York, 1788). The best editions for present use are those of H. C. Lodge (New York, 1888) and P. L. Ford (New York, 1898). See F. S. Oliver, *Alexander Hamilton*, 165-179.

<sup>2</sup> The launching of the new government is described in J. S. Bassett, *The Federalist System*, Chap. 1.

disputation, and declamation. While some have boasted it as a work from Heaven, others have given it a less righteous origin. I have many reasons to believe that it is the work of plain honest men, and such, I think, it will appear." Herein is to be found the reason why the instrument, once adopted, succeeded beyond the hopes of its most ardent defenders. First, it was a brief and simple document. Even with the nineteen amendments that have been added, it fills only fifteen or twenty pages of print, and one can read it through in about the same number of minutes. It is shorter than the constitution of any other nation except France, or of any one of the forty-eight states of the Union. Its arrangement is not wholly logical, but nothing is sacrificed on that account. Following a brief preamble, three main articles are devoted to the legislative, executive, and judicial branches, respectively. Four lesser articles deal, in order, with the position of the states, the modes of amendment, the supremacy of national power, and ratification. Finally come the amendments, appended at the end and numbered serially.

Thanks to the committee of detail, and especially to Gouverneur Morris, the language of the original document is clear, direct, and concise; there is not an unnecessary word or an intentionally ambiguous phrase.<sup>1</sup> Some clauses, *e.g.*, that authorizing Congress to "regulate commerce . . . among the several states," lend themselves, it is true, to more than one interpretation; and the conflicts and decisions flowing from this circumstance make up a considerable part of the country's constitutional history in the past hundred and thirty years. Nevertheless, our greatest constitutional controversies have risen rather from omissions than from provisions of doubtful meaning. In part, these omissions are accounted for by the impossibility of foreseeing certain developments which have put a new aspect on the work of government—for example, the changes in transportation and communication resulting from the introduction of steam-power and electricity. But in part they arose also from the unwillingness of the constitution's architects to jeopardize their work by forcing a decision on delicate matters which it was possible to pass over in silence. Could a state, by its

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VI  
Room for  
differences  
of inter-  
pretation

<sup>1</sup> The ablest foreign writer on American government says that the document "ranks above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle with elasticity in details." J. Bryce, *American Commonwealth* (4th ed., 1910), I, 28.

own volition, withdraw from the new union? The constitution did not undertake to say. It could be argued plausibly that the union was intended to be permanent, and that no member had a right to secede. On the other hand, the "sovereignty" of the states was nowhere expressly denied, and the thrice-repeated assertion of the Articles that the union was to be permanent found no place in the new instrument. The matter was glossed over, not because members like Madison and Hamilton were unmindful of it, but because it was inexpedient to press it when the preservation of a central government of any kind whatsoever was hanging in the balance. The "plain honest men" of whom Morris wrote were bent on an immediate practical remedy of the defects of the existing government, not on making a constitution that would prove an ideally logical, comprehensive, and definitive document.

The consti-  
tution's  
sources

It follows that the fathers did not go out of their way to invent new political forms. Nor did they borrow far afield. Some of them were students of Vattel, Montesquieu, and other Continental writers; some had read history and could cite the failures of ancient confederacies or draw illustrations from the experiences of France and other Continental states. But, as one writer has observed, this knowledge taught them rather what to avoid than what to adopt; and in so far as they drew upon European sources at all, those sources were the common law, the principles of Magna Carta and the Bill of Rights, the teachings of Locke and Blackstone, and other characteristic products of their English motherland. This rich heritage, however, had passed to America far back in colonial times, and when the national constitution was made was already deeply embedded in the constitutions, laws, and political usages of the states. The new instrument, accordingly, was based mainly and directly upon the political experience of Americans themselves in the colonial and Revolutionary periods. "Experience," said John Dickinson, "must be our guide; reason may mislead us." Fortunately, the people had accumulated enough political experience by 1787 to serve as a rich and adequate resource.

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## 2. THE FEDERAL SYSTEM

### CHAPTER VII

#### THE NATIONAL GOVERNMENT AND ITS POWERS

The  
basic  
relation-  
ship of  
nation and  
states

The fundamental law which the "founding fathers" thus arduously prepared and hopefully adopted has served as the groundwork of our governmental system for almost a century and a half. No other country has a written constitution with so imposing a record. From this point onward, we are to be concerned with the structure and workings of the national government for which this constitution provides, and also of state and local governments which, although dating from an earlier time in the older portions of the country, nevertheless come within the far-flung bounds of the constitution's supreme authority. This mixed scheme of national and state governments, each with its own officers, functions, and powers, is, indeed, the outstanding feature of our constitutional system; and the broad outlines of it have to be brought into view before one can study either national or state government at all effectively. For a hundred years, most of the great decisions of the Supreme Court at Washington have turned on the complicated and ever-shifting relation of nation and states; many of the questions that stir widest discussion to-day, *e.g.*, prohibition and the control of water power, are rooted in the same eternal problem. This matter must therefore first of all be looked into in some detail.

The  
states  
essential  
to the  
system

One thing above all others the makers of the constitution were bound to do, namely, to keep a place for the states in the new political order; never for a moment did any one suppose that the whole country could be thrown into a mass, with a unitary government like that of England or France. Whatever else it might turn out to be, the new system was predestined to be federal. All of the existing states were carried over from the old régime into the new, with their names, boundaries, and governments unchanged, and with functions and powers curtailed, to be sure, but by no means destroyed. The constitution extended to eleven states when it first took effect, and to thirteen when the work of ratification was

complete. Furthermore, it authorized Congress to admit new states into the Union; and from 1791 onwards this power was used, as the western and southern country filled with population, until in 1912 the admission of New Mexico and Arizona brought up the number to the present total of forty-eight.

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The relation of nation and states was defined in the constitution as precisely as the makers thought necessary, or found feasible and probably as clearly as existing experience and conditions permitted. By its very nature, federalism, however, sets up a highly artificial, delicate, and unstable equilibrium between central and divisional governments, and it is not to be wondered at that hardly had the new American system gone into operation before doubts and difficulties came to light. No one at all familiar with the course of our national history will need to be told that out of the resulting differences of opinion arose long and bitter disputes which not even the Civil War availed to settle completely. The question at issue was not merely the tenuous line of division between national and state powers, but also the nature of the union itself. Was the United States, under the constitution, a true and indivisible nation? Or was it only a league of sovereign states, as before 1789? That the states were not mere administrative subdivisions, nor yet only subordinate areas with a limited autonomy conferred by the central government, was conceded by all. They were, as everybody knew, distinct, original, indestructible political entities, with extensive inherent powers. But did this mean that they were sovereign? Or were their people so merged in a common, superior, national organization that the states also, as political units, had become inextricably embedded in it?

Did the  
states  
remain  
sovereign?

The states' rights school took the first view, the nationalist school the second. Starting with the familiar idea of the Revolutionary period that society is a product of compact or agreement, and that government rests, as Jefferson put it, on "the consent of the governed," the states' rights forces, long and ably led by John C. Calhoun, developed a body of doctrine somewhat as follows: (1) the colonies, upon winning independence from Great Britain, became sovereign states; (2) the states remained sovereign under the Articles of Confederation; (3) the constitution, in its turn, was also a compact among sovereign political entities, conferring augmented powers upon the central government, it is true, yet not altering the fundamental basis of the union; (4) any state had a right to withdraw from the arrangement if it considered

The "states'  
rights"  
argument



that the terms of the compact were being violated by the co-states or by the government which had been set up as joint agent.<sup>1</sup> Many held in earlier days that sovereignty under the constitution was divided between the states and the United States. But Calhoun, arguing that sovereignty is by nature indivisible, assigned it exclusively to the states.

The nationalist school, growing ever more doubtful about the whole compact theory of society and government, put a very different interpretation on the constitution, and upon the intentions of its framers. As expounded by Webster in his speeches in reply to Hayne in 1830, and by Joseph Story in his *Commentaries on the Constitution*, published in 1833, the nationalist argument was, in summary, this: (1) the constitution was established, not by states, but by the people of the United States; (2) sovereignty—which the nationalists, like Calhoun, regarded as indivisible—was lodged, not in the states, nor yet in the central government as such, but in the people as a single aggregate; (3) the union was indestructible, in the sense that, being a union of people, and not of states, it could be overthrown or changed only by exercise of the ultimate right of revolution or by other action taken, not by states as such, but by the general body politic. "It is, sir, the people's constitution," declared Webster in his second speech in the debate of 1830, "made for the people, made by the people, and answerable to the people. The people of the United States have declared that this constitution shall be the supreme law."<sup>2</sup> It was the common nationalist view that at no time in their existence had the states been really independent and sovereign; although some writers and debaters preferred not to go into that question, but rather to argue simply that the constitution—irrespective of what preceded it—was the fundamental law of a single sovereign people.

Considered in the light of contemporary evidence, the nationalist theory presents some serious difficulties. Before 1789, the states habitually spoke of themselves in their public documents as "sovereign," and people everywhere manifestly regarded them as such. These facts neither Hamilton nor Madison, nor indeed Webster himself, undertook to deny. In truth, no difference of opinion on the matter seems to have risen before 1830. In the second place, it is almost equally clear that when the constitution was adopted

<sup>1</sup> A. C. McLaughlin, "Social Compact and Constitutional Construction," *Amer. Hist. Rev.*, V, 467-490 (Apr., 1900), and *The Courts, the Constitution, and Parties* (Chicago, 1912), Chap. iv.

<sup>2</sup> *Works of Daniel Webster* (5th ed.), III, 321.

the people regarded it as a compact among the states. The instrument, in fact, declared itself to be established *between the states* ratifying it; and at one point in *The Federalist* Madison expressly says that the "assent and ratification" provided for "is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong," and that the act establishing the constitution was, therefore, to be "not a national but a federal act."<sup>1</sup>

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However, there is also evidence pointing in the opposite direction. First, there is the negative circumstance that nowhere in the debates in the federal and state conventions, or in the pamphlets circulated to influence public opinion on the question of ratification, was the right of secession ever once asserted; indeed, it was declared again and again without being contradicted that when the states had once entered the new union they could not withdraw. Ratification would doubtless have been resisted less strenuously had it been supposed that a state could secede at will. It is significant, too, that the constitution was ratified and made effective, not by Congress, nor yet by the state legislatures, as it might very well have been, but by conventions elected specially for the purpose by the people. Not to be overlooked, finally, is the oft-quoted sentence with which the constitution opens: "We the people of the United States, in order to form a more perfect union, . . . do ordain and establish this Constitution. . . ." Even though perhaps to be regarded as a euphemistic flourish rather than as a deliberate statement of legal fact, this assertion of the preamble is not altogether devoid of significance.

The most careful survey of the evidence that can be made brings one to substantially the following conclusions: (1) The framers of the constitution and the men who urged its ratification were not bent on carrying out some clearly defined and consistent theory. They were opportunists, looking only to the solution of immediate difficulties in a purely practical way. (2) Along with much belief in the contractual nature of the new union went a widely shared conviction (even though the two views were logically inconsistent) that a national state, under which no rights of nullification or secession would exist, was being set up. (3) The idea of divided sovereignty presented no difficulty in the days when the constitution was adopted. People then were content to think of the new central government as sovereign in respect to

Conclusions that  
may be  
reached

<sup>1</sup> No. xxxix (Lodge's ed.), 236.

all powers delegated to it and the states as sovereign in everything else. The Supreme Court took this view in the case of *Chisholm v. Georgia* in 1792, and in a long line of subsequent decisions; Madison expounded it in many of his writings; the older states' rights school fully accepted it; only when Calhoun, Webster, and their contemporaries came on the stage was the notion repudiated. (4) When pushed to say where the ultimate controlling authority lay, the fathers replied, "With the people."<sup>1</sup> But they did not undertake to say whether this meant the citizen bodies of the thirteen states, considered severally, or the people of the country taken as a whole. Instead of giving any definite answer to the question, they, as one writer has remarked, "merely pushed the problem one step further back and there left it as undetermined as before."

Historical  
triumph  
of the  
nationalist  
view

Happily, the logic of events has gone far toward clearing up these abstruse and debatable matters. As every student of our history knows, the trend since 1789 has been decidedly in the direction of a strong national government based on an indissoluble union of the states. In a remarkable series of decisions in cases turning on constitutional questions, the Supreme Court, notably during John Marshall's long service as chief justice, consistently—and with powerful effect—gave its support to the nationalist view. The denial and total extinction of the alleged right of a state to nullify acts of Congress, notwithstanding momentary successes of nullificationists in South Carolina and Georgia, worked to the same end. And—passing over a great number of other contributing factors—the failure of secession in 1860-65, and the general acceptance of the doctrine that a state cannot secede, clinched the victory of nationalism and stamped the union with the quality of permanence which, whatever the intentions of the founders, it unmistakably possesses in our own day.

The  
people  
ultimately  
sovereign

The verdict of history therefore is that the ultimate, *i.e.*, sovereign, authority in this country is, not each state for itself, nor yet the government of the United States, but the people of the country considered as a whole. They, and they only, have the last word in determining the nature of the political system and the powers to be exercised under it. The thing that is divided is, not sovereignty itself, but merely the exercise or use of sovereign powers. For obvious reasons, the people cannot, in the mass, execute laws, operate public services, or administer justice. They can,

<sup>1</sup> For example, James Wilson's argument in the Pennsylvania convention. J. Elliot, *Debates*, II, 504.

and in several states do, legislate, through the medium of the popular initiative and referendum. Even in this field, however, they nowhere try to perform the whole task in such direct fashion. What happens, therefore, is that they entrust the exercise of portions of their sovereign authority—executive, legislative, and judicial—to agents which we know as the national and state governments. And, aside from making provision for the structure of the national government, the constitution of the United States is devoted mainly to drawing boundary lines between the powers which the national and state governments, respectively, are required or permitted to wield.

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VII

Three or four major facts about this distribution of powers call for emphasis. The first is that the national government has only delegated, "enumerated," powers. Express grants of power are made to Congress, to the president, to the courts; and thereupon it is stipulated, in the Tenth Amendment, that "all powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." We shall see that, as a result of usage, legislation, and judicial interpretation, the powers wielded by the national government nowadays are immeasurably greater than in the times of Washington and Jefferson. At some points they appear to transcend the bounds prescribed in the constitution, and many people think that they do so. In the eye of the law, however, whatever expansion has taken place—except in taxation and a few other important fields where changes have been specifically authorized by constitutional amendments—has been the result exclusively of broader and minuter applications of powers already possessed.<sup>1</sup> President, Congress, and courts have no proper authority except such as can be found somewhere within the four corners of the constitution.

Nature  
of the  
distribution  
of powers

A second fact, already suggested, is that the state governments, on the other hand, have powers that are original, inherent, and largely undefined. A certain number of powers belonging to state governments are, it is true, mentioned in the national constitution. But there is no attempt to present any comprehensive or complete list. Carrying over into the new system the great bulk of powers which they possessed under the old one—and they would never

<sup>1</sup> The view of President Roosevelt and others that powers affecting the nation as a whole belong to it, although not granted to it, was expressly rejected by the Supreme Court in *Kansas v. Colorado*, 206 U. S. 46 (1902).

have ratified the constitution unless permitted to do this—the original states have ever afterwards enjoyed the ample and undefined sweep of powers guaranteed in the Tenth Amendment quoted above. And of course, under the principle of state equality, all states subsequently admitted to the Union are entitled to a similar scope of authority.

A third fact is that no government under the American federal system has unlimited powers. In Great Britain, where federalism is unknown, the national government is legally omnipotent. Parliament, as its supreme organ, can change the constitution, alter or abolish local government areas, and legislate as far as it likes on any subject; and there is no court or other agency with power to pronounce a parliamentary act unconstitutional, and therefore unenforceable. It is quite otherwise in the United States. The national government has only the powers delegated to it; the state governments, while enjoying wider latitude, are hedged about by restraints, imposed in both the national and state constitutions; and measures enacted by either Congress or a state legislature in excess of authorized powers are practically certain sooner or later to be called in question, and to be rendered null and void by action of the courts.

Powers  
retained  
by the  
people

From this it follows that by no means *all* power has been entrusted by the people to governmental agencies; on the contrary, great blocks of power have been kept in the people's own hands. Powers not delegated to the national government, nor prohibited to the states, says the Tenth Amendment, are reserved to the states respectively *or to the people*. The enumeration in the constitution of certain rights, says the Ninth Amendment, shall not be construed to deny or disparage others retained *by the people*. In addition, many specific restrictions protect the individual, in both person and property, against the national government;<sup>1</sup> many others protect him against the government of his state; and several protect him against both national and state governments. The constitution thus creates—or, better, recognizes—a system of private rights against all governmental interference, from whatsoever source. "It provides for each person 'a sphere of anarchy'—of no government—so to speak, within which he may act without any intervention on the part of public officials.'" <sup>2</sup>

<sup>1</sup> Contained mainly in Art. I, § 9, and Amendments I-VIII.

<sup>2</sup> C. A. Beard, *American Government and Politics* (5th ed.), 102. See pp. 148-158 below.

The distribution of powers under the constitution accordingly works out somewhat as follows:

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1. *Powers vested in the national government exclusively.* These are named, and are meant to be powers which affect the interests of the whole people and hence need to be exercised by a single authority. They include the conduct of foreign relations, the regulation of foreign and interstate commerce, declaring and carrying on war, treaty-making, coinage, and regulating weights and measures.

Powers  
conferred  
or recog-  
nized

2. *Powers recognized as belonging to the state governments exclusively.* Under the Tenth Amendment, quoted above, these include all powers of government whatsoever which are not delegated to the United States and at the same time not prohibited to the states. They are "reserved" powers, in the sense of powers remaining after others were assigned to the national government. They, of course, are not enumerated in the constitution, but are rather to be ascertained by process of elimination, under the principle of the amendment cited. An illustration would be the power to create counties, or to charter cities. In most of its aspects, the "police power" also comes under this head.

3. *Powers belonging to both national and state governments.* These include, chiefly, powers which the state authorities were accustomed to exercise before 1789, and which, without being withdrawn from the state governments, were conferred on the national government as well. In the main, these concurrent powers are of such a nature that both governments must necessarily be permitted to exercise them, *e.g.*, the power of taxation. Others, however, arise from no inherent necessity, *e.g.*, the power to enforce the Eighteenth Amendment "by appropriate legislation."

4. *Powers forbidden to the national government.* In theory, it was unnecessary for the makers of the constitution to specify what the national government should not do, because the general principle is that its powers are limited to those conferred. Nevertheless, it was foreseen that there would be differences of interpretation, and accordingly certain definite prohibitions were written into the fundamental law. For example, no tax may be laid on exports, and no capitation or other direct tax may be levied except in proportion to population. The original instrument, however, fell far short of popular desire in this direction, and of the ten amendments adopted in 1789-91, eight directly, and the other two indirectly, put the national government under further specific re-

Powers  
partially  
or totally  
prohibited

straints. In this way, Congress was forbidden to make any law abridging the freedom of speech or of the press or infringing the right of the people "to keep and bear arms." In similar fashion, excessive bail, excessive fines, and cruel and unusual punishments were prohibited.

5. *Powers forbidden to the state governments.* Certain powers, as being either inherently objectionable or inimical to national unity, are forbidden to the states unconditionally; for example, making treaties and alliances and coining money. Certain others may be exercised only with the consent of Congress; for example, laying duties on imports or exports (except in so far as necessary for the enforcement of inspection laws), laying tonnage duties, keeping troops or ships of war in time of peace, and engaging in war "unless actually invaded or in such imminent danger as will not admit of delay."

6. *Powers forbidden to both national and state governments.* These include powers prohibited to the states, and also prohibited to—or at all events not conferred upon—the United States. Thus, neither a state nor the United States may pass a bill of attainder or an ex post facto law, or grant a title of nobility. The national government is expressly forbidden to take private property for public use without just compensation; and judicial construction, developed in a long line of cases, applies the same rule to the states. The Fifteenth Amendment forbids nation and states alike to deny or abridge the right of citizens of the United States to vote "on account of race, color, or previous condition of servitude," and the Nineteenth forbids similar discrimination "on account of sex."

The  
question  
of implied  
powers

The careful phrasing of the constitution did not prevent—no linguistic niceties could have prevented—differences of opinion as to the limits of power of both the national and state governments, and lively controversies arose before the new system had been in operation a year. In 1790, Alexander Hamilton, secretary of the treasury, proposed the establishment of a national bank. Opponents of centralization at once objected that the constitution, in enumerating the powers of Congress, said nothing about a bank. Hamilton and those who supported his policy replied that while the constitution did not, indeed, authorize Congress in so many words to create a bank, the power to do so could easily be deduced from certain grants of authority about which there could be no question. This view prevailed, and the bank was established. Opin-

ion on the matter, however, continued divided; and from this beginning the issue of "implied powers" broadened out until it became the weightiest—except only that of secession—in the entire history of the country.

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Led by Jefferson, the strict constructionists argued that the national government had no powers except such as were expressly delegated to it in the constitution, or, at the most, such as could be shown to be indispensably involved in the exercise of these enumerated powers. To take a single step, urged Jefferson in a letter in which he gave Washington his views on the constitutionality of the proposed bank, beyond the boundaries "specially drawn" around the powers of Congress by the Tenth Amendment "is to take possession of a boundless field of power, no longer susceptible of any definition."<sup>1</sup> On the other hand, the loose, or broad, constructionists contended that the national government had all powers which could by any reasonable interpretation be regarded as implied in the letter of the granted powers, and also that it had a right to choose the manner and means of performing its work, even though this meant to use agencies which were not necessarily indispensable for its purposes. "There are express and implied powers," wrote Hamilton, "and the latter are as effectually delegated as the former. . . . The only question, then, is this: Has the means to be employed any natural relation to any of the acknowledged, lawful *ends* of the government? The test of constitutionality lies in the *end* sought. Is the *end* included in the expressed powers? If it is so included, the means requisite and fairly applicable are constitutional."<sup>2</sup>

On grounds of pure theory, Jefferson's argument was plausible; and events proved him right in predicting that the doctrine of implied powers, once accepted, would lead to endless expansion of the national government's activities—often at the direct expense of powers originally considered as belonging to the states. The logic of practical necessity lay, however, with the Hamiltonian view. If the national government was to attain its proper ends, it must be free to wield powers both express and implied. At best, a national government operating under a federal system has difficulty in maintaining adequate control of affairs. If held to the letter of an initial grant of powers, strictly and narrowly construed, it would frequently be halted at points where inaction is ruinous.

Practical  
necessity  
of implied  
powers

<sup>1</sup> *Writings* (Ford's ed.), V, 284.

<sup>2</sup> *Works* (Lodge's ed.), III, 449-450.



This was eventually conceded, although grudgingly, by the Jeffersonians themselves, and when they gained control of the government in 1801, they took advantage of implied powers almost as freely as had their Federalist rivals. On no other basis, for example, could Louisiana have been annexed in 1803 or an embargo laid on foreign trade in 1807.

In the course of time, the question, as a matter of constitutional construction, reached the Supreme Court; and in a great series of nationalizing decisions between 1809 and 1835 that tribunal—while laying down limits beyond which implied powers could not properly be carried—gave the full weight of its authority to the doctrine. The classic statement of the Court's views was made by Chief Justice Marshall in the case of *McCulloch v. Maryland* in 1819 as follows: "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist. . . . The powers of the government are limited, and its powers are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional."<sup>1</sup> This principle gained general acceptance and is to-day a leading feature of our constitutional law. Not only so, but under the impact of new economic and social conditions it is now applied in directions and in situations of which Marshall never dreamed.<sup>2</sup>

One other salient aspect of our federal system is the complete control of the national government within the sphere thus marked out for it. This is secured mainly by a clause of the constitution reading as follows: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United

<sup>1</sup> 4 Wheaton 316; R. E. Cushman, *Leading Constitutional Decisions*, 7-20.

<sup>2</sup> For comment and illustrations, see Chaps. XXIV-XXVIII below.

States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."<sup>1</sup> "This clause," observes a distinguished writer, "may be called the central clause of the constitution, because without it the whole system would be unwieldy, if not impracticable. Draw out this particular bolt, and the machinery falls to pieces. In these words the constitution is plainly made not merely a declaration, a manifesto, dependent for its life and usefulness on the passing will of statesmen or of people, but a fundamental law, enforceable like any other law in courts."<sup>2</sup> The national government acts by its own laws, through its own officers, upon its own citizens. Furthermore, the state courts, no less than the national tribunals, are required to recognize the constitution as the supreme law and to enforce it as such.

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VII

When put to the test of actual use, the clause quoted proved, however, not quite so conclusive as it seemed. Indeed, difficult questions sprang from it, leading to prolonged and serious controversies. It was clear that both national and state authorities must carry out, or at least conform to, the provisions of the constitution itself. It was no less certain that every act of Congress passed in accordance with the terms of the constitution must be enforced. Finally, it was plain that no act of a state legislature which was contrary to the national constitution was valid. But if questions on these points were raised, who was to interpret the constitution and say what its provisions meant? Who was to decide whether a given act of Congress was or was not "made in pursuance" of the constitution—in other words, whether it was "constitutional"? Similarly, who was to determine whether an act of a state legislature, when called in question, was in accordance with the supreme law or contrary to it and therefore void?

Who was to settle conflicts between the nation and the states?

The constitution does not say how these things shall be done, and there has always been difference of opinion as to what the framers intended. The Virginia plan, indeed, proposed to associate a "convenient" number of the federal judges with the executive to form a council of revision. This body was to examine every act passed by Congress, and any measure to which it objected was to be allowed to take effect only if subsequently reenacted by a two-thirds vote in both houses. The convention's final decision was,

A proposal that did not prevail

<sup>1</sup> Art. VI, § 2.

<sup>2</sup> A. C. McLaughlin, *The Confederation and the Constitution*, 247.

however, to put the veto power in the hands of the president alone, and the question whether the courts, as an incident of their general judicial power, should have the right to declare a measure unconstitutional after it had once been duly placed on the statute book, although discussed somewhat, was left unanswered. In consequence, there have always been people who maintained that the fathers did not intend that the courts should have such power, and that the exercise of it by them is unsupported by the letter and contrary to the spirit of the constitution, and therefore sheer usurpation. The states' rights forces sought, as we have seen, to make the states the sole judge of the constitutionality both of their own legislation and of the acts of Congress.

The contrary view has, however, won more general acceptance. In the first place, the courts of the states had in several instances before 1787 refused to enforce legislative measures on the ground that they were unconstitutional.<sup>1</sup> In the second place, the men who framed and ratified the constitution represented those classes and interests which, in the words of Gouverneur Morris, wanted to check the "precipitancy, changeableness, and excess" of popular legislative bodies, and which were likely to see in the exercise of judicial review an important means to that end. Finally, judicial review is entirely in accord with the general spirit of the constitution, notably with the idea of checks and balances which, as we shall see, runs through the entire instrument.<sup>2</sup>

Here again, however, fact is more important than theory; and the fact is that the power of judicial review was early brought into play by the Supreme Court and has been employed successfully by both federal and state courts for more than a hundred years. An act of Congress was held void by the Supreme Court on the ground of unconstitutionality in the case of *Marbury v. Madison*, decided in 1803;<sup>3</sup> other decisions of similar purport followed in impressive array; state statutes were declared void, on constitutional grounds, in a long line of cases beginning with *Fletcher v. Peck* in 1810.<sup>4</sup> Thus was developed in actual practice,

<sup>1</sup> See p. 74 above.

<sup>2</sup> These matters are explained clearly in C. A. Beard, *The Supreme Court and the Constitution*, especially Chaps. II-V. The rise of the practice of judicial review is described in A. C. McLaughlin, *The Courts, the Constitution, and Parties*, Chap. I.

<sup>3</sup> 1 Cranch 137. To be more exact, that part of the Judiciary Act of 1789 which authorized the Supreme Court to issue a writ of mandamus under certain circumstances.

<sup>4</sup> 6 Cranch 87.

and irrespective of what the constitution's makers may have intended, a function which sharply differentiates our American courts from the courts of England and most other countries. Judicial review has, indeed, been termed America's unique contribution to the science of politics.<sup>1</sup> Technically, our courts do not veto or annul laws. They do not invalidate *laws* at all; for the measures which they pronounce unconstitutional are regarded as having never been laws (even though they may actually have been in operation for months or years), and moneys that have been paid over under them are recoverable. All measures, however, are presumed to be valid law until the courts declare otherwise; and no federal court will render a decision on a given measure except in connection with an actual case arising under its operation.

How is the national supremacy of which we have spoken maintained and enforced? Normally, by the ordinary routine processes of legislation and administration. When, however, these prove inadequate, two great resources can be called into play. One is the authority of the president to execute the national laws by the use of force, whether the standing army, the militia, or some specially created military establishment. The other is the right of the federal courts to hear and decide cases in which national interests are involved. This use of the judiciary, in turn, appears in two chief forms. One is the right of a federal tribunal—the Supreme Court—to hear appeals from the highest courts of the state. This right is granted to the Supreme Court in the constitution, and in the federal statutes it is so defined as to enable any case, civil or criminal, to be carried by appeal from the highest court of a state to the federal Supreme Court if during the proceedings in the state courts any state statute, or exercise of state authority, is alleged to be contrary to the national constitution, laws, or treaties.<sup>2</sup> The other mode of judicial control is the removal of cases from lower state courts to federal courts, and is commonly employed when a national officer, in the exercise of his duties, performs an act which is contrary to state law and is, on that account, put on trial in a state court.<sup>3</sup> In these and other ways, the federal courts steadily uphold the supremacy of national law and the independence of national

How  
national  
supremacy  
is enforced

<sup>1</sup> The principle is, however, winning increased recognition abroad. See J. W. Garner, *Political Science and Government*, 759-770.

<sup>2</sup> It may be noted that the exercise of judicial review by the Supreme Court is both more frequent and more important in relation to state legislation than to national legislation. Its chief use has, indeed, been to protect the national powers against encroachment by the states.

<sup>3</sup> *Tennessee v. Davis*, 100 U. S. 257 (1880).

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The actual  
legal  
limits of  
national  
power

officers; and the state courts are restrained from interfering in any manner with national judicial process.

We shall come upon plenty of illustrations of how these principles and usages—the doctrine of implied powers, the practice of judicial review, and others—have together contributed to build up the vast structure of authority now possessed by our national government. In closing the present chapter, we need only bring to a focus the general character of the process, which can hardly be done more effectively than by quoting some observations by one of the keenest students of our constitutional development. “We speak of our national government,” writes Professor McBain, “as one of limited powers. We say that it is limited to the powers expressly or impliedly granted by the constitution. This is, however, half truth, half fiction. True, the words of the constitution seem to confer only specific powers. But look the situation squarely in the face. Written words have no binding force except as they are given such force by human interpretations and applications. Under every written constitution some organ or organs of the government itself have the power to determine the measure of the government’s own competence. The government decides for itself what the words of the constitution imply and how far it may go in the exercise of powers. The government of the United States is no exception. In most countries this power of self-determination, of self-expression, of self-aggression, resides in the national legislature. With us the power is initially in Congress and ultimately in the courts, especially in the Supreme Court. But the Supreme Court is merely an organ of the government. It is none the less so because of the high esteem in which it is commonly held or because of its general aloofness from partisan politics. Whatever is enacted by Congress and approved by the Supreme Court is valid even though to the rest of us it is in plain violation of an unmistakable fiat of the fundamental law. ‘Things may be legal and yet unconstitutional,’ Lord Brougham once said of English law. The paradox is equally true of American law. There is no limitation imposed upon the national government which Congress, the president, and the Supreme Court, acting in consecutive agreement, may not legally override. In this sense the government as a whole is clearly a government of unlimited powers; for by interpretation it stakes out its own boundaries.”<sup>1</sup>

<sup>1</sup> *The Living Constitution*, 37-38.

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## CHAPTER VIII

### THE POSITION OF THE STATES

Importance  
of the  
states as  
govern-  
mental  
areas

The prestige and power of the national government must not for a moment be allowed to blind us to the importance of the states. After all, our nation is the *United States* of America; and while at many points—particularly in respect to matters of a more purely political nature—the general government has gained decidedly since 1789 at the expense of the states, the states themselves, as a result of the increasing complexity of modern life, have developed new functions and activities on such a scale that they now have more governmental work to do than ever before. Though inferior to the nation politically, New York and Ohio and California and all the rest are still, in their respective corners of the land, the principal areas in which the business of law-making, administration, and justice is carried on. Impreguably entrenched as distinct, self-governing units or jurisdictions, with broad and undefined (though, of course, not unlimited) powers, the states stand quite as close to the people as does the national government, and indeed touch their everyday interests at a good many more points. They conduct a bewildering variety of legislative and administrative experiments “under the urge of a local opinion that does not have to wait to convert the entire nation to its hopes and beliefs,” and often mark out lines of advance, *e.g.*, in railroad regulation, suffrage, budgetary reform, and industrial legislation, along which the national government treads belatedly. Furthermore, the national government is predicated absolutely upon the existence and functions of the states; if they were suddenly blotted out, it would have to be reconstructed from the ground up. The president is chosen by electors representing the states as such and considered to be state officers; United States senators are elected by states, and members of the House of Representatives from districts laid out by state authority; in the main, the states determine who shall vote for president, senators, and representatives; amendments to the national constitution become effective only after being ratified by states; the militia, although forming a “national

guard," is organized on a state basis; local peace officers functioning under state authority arrest offenders against national laws and local jailors keep them in confinement; state, county, and municipal officers are appointed prohibition officers to help enforce the Volstead Act; and a great and growing system of national aid in such matters as highways, education, and social welfare is conditioned upon coöperation by the states as agents for the administration of federal expenditures.

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The way in which the states, viewed from within, are organized and governed will be described in a later portion of this book. For the present, we are concerned, rather, with the place which the forty-eight divisions occupy in the country's governmental system taken as a whole, and, in particular, with the principles and rules which fix the relations between state and nation, and also between state and state. Far from being fixed and stationary, these relations—especially as between the nation and the states—are continually shifting. Acts of Congress and of state legislatures, judicial decisions, and executive orders develop them on new lines and in new directions from year to year, and almost from day to day. Their larger features are, however, laid down in the national constitution; and it is mainly with these that we are here concerned.

Aspects  
to be  
consider-  
ed here

The first thing to be observed is that the states are equals in law and that, being such, they are free from control by one another. In size, population, and importance they, of course, vary enormously. The largest, Texas, has an area of 265,780 square miles, which is almost exactly the combined extent of France, England, and Wales; the smallest, Rhode Island, contains only 1,250 square miles. The most populous, New York, had 12,588,066 inhabitants in 1930; the least populous, Nevada, had 91,058. Average density of population varied, at the same date, all the way from 644.3 per square mile in Rhode Island to 0.8 per square mile in Nevada.<sup>1</sup>

Equality  
in law

<sup>1</sup> The territorial and populational inequality of the states has given rise to a good deal of complaint, especially in connection with the matter of equal representation in the Senate. The most important criticisms of existing arrangements have to do, however, with the failure of state boundaries to conform to lines that would mark off areas having topographic, civic, and economic unity. In particular, it is suggested that certain metropolitan regions, especially those centering in New York and Chicago, be given separate statehood. A state comprising Greater New York has often been proposed, but the "up-state" portions of the existing commonwealth—constitutionally assured of a permanent majority in the legislature, and disinclined to surrender the benefits flowing from the city's heavy yield of taxes—are not favorably disposed. The joint resolution admitting Texas in 1845 provided that that state



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Some states are almost wholly agricultural, others are mainly industrial and commercial. Some are of great weight in the councils of the nation, others count for comparatively little. All have their separate and differing constitutions, laws, courts, systems of taxation, and schemes of local government. Nevertheless, in their constitutional and legal status they are equal. No one of them has any powers which do not belong to all of the others. Constitutional limitations, about which more will be said presently, apply to all alike. All have the same obligations toward the national government, toward their citizens, and toward each other. Finally, no one of them can, as a commonwealth, exercise any form of coercion upon another. The only qualification necessary to add is that, as will appear, Congress, when admitting a new state, may impose conditions upon it which were not imposed upon other states. But as a restriction upon state equality this is more apparent than real, because, once a state is in the Union, special conditions—at all events, those of a political character—which have been exacted of it are usually not difficult to evade if the inhabitants so desire.

Obligations  
of the  
national  
government  
toward the  
states:

1. Respect  
for territorial  
integrity

2. Protection  
against  
invasion  
and  
domestic  
violence

The position of the states is further determined by certain obligations which the constitution imposes, in their behalf, upon the national government. In the first place, that government is expressly required to respect a state's territorial integrity. No state may be "formed or erected" within the jurisdiction of any existing state except with the consent of its legislature. Nor may a state be formed by uniting two or more states or parts of states unless the legislatures of the states affected concur.<sup>1</sup> In other words, a state cannot be deprived of its separate existence, or even of territory, without its own consent.

A second obligation of the national government is to protect each state against invasion and domestic violence.<sup>2</sup> An invasion of a state by a foreign enemy is, of course, also an invasion of the United States, and it is entirely logical that the national govern-

ment, with its own consent, be split up into not more than five states; and suggestions that this be done have been heard from time to time in later years, the most recent coming from Representative John N. Garner in 1930. State sentiment would doubtless prove an insuperable obstacle, even if Republican objection to the resulting increase of Democratic members of the Senate could be overcome. A partition of California into two states has stirred some discussion, but this also is improbable. For interesting maps rearranging state boundaries according to considerations of regional unity, see *Chicago Tribune*, Jan. 5, 1930, pt. 11, p. 5. Cf. W. B. Munro, "Do We Need Regional Governments?", *Forum*, LXXIX, 108-112 (Jan., 1928).

<sup>1</sup> Art. IV, § 3.

<sup>2</sup> Art. IV, § 4.

ment should be authorized and required to repel the attack without waiting for any independent effort to be made by the states as such, or for a request for protection to be received from them. The repression of insurrections, riots, and other forms of domestic violence is a different matter. One of the principal things that the government of a state is expected to do is to maintain order; and unless, finding itself unable to cope with the disturbance, such a government calls upon the national authorities for assistance, those authorities will not intervene, so long as the national laws are not violated and national property is not endangered. If, however, assistance is requested, the president will comply, unless he feels that the state can itself handle the situation adequately; and if national interests are menaced, he will act without invitation from the state, and even against its consent.<sup>1</sup>

A third requirement made of the United States is that it shall guarantee to every state a republican form of government.<sup>2</sup> The men who framed and adopted the constitution had no desire to see monarchical institutions revived or oligarchy established within the limits of the new nation. They shuddered at the recollection of the Shays rebellion and other movements which had threatened to upset existing governments, and they determined to put it within the power—indeed, to make it a solemn duty—of the national government to prevent any form of political organization other than republican from establishing itself anywhere in the country. They did not define the term “republican,” and it is clear that they did not mean to require any one precise style of governmental organization, to the exclusion of all others. Madison assured the people that they had a right to “substitute other republican forms” whenever they chose and to claim the federal guarantee in behalf of them.<sup>3</sup> All of the existing state governments, though in many respects dissimilar, were regarded as falling within the scope of the term, and likewise, of course, the new national government under the constitution. The contemporary idea of what constitutes republicanism is sufficiently indicated by a resolution of the Massachusetts constitutional convention of 1780 which says: “It is the essence of a free republic that the people be governed by fixed laws of their own making.”<sup>4</sup> Paraphrased by a recent writer, the definition becomes: “A republican form of

3. Guarantee of a republican form of government

<sup>1</sup> See p. 271 below.

<sup>2</sup> Art. IV, § 4.

<sup>3</sup> *The Federalist*, No. XLIII (Lodge's ed.), 271.

<sup>4</sup> *Journal of the Massachusetts Constitutional Convention, 1779-1780*, p. 24.

Who  
decides  
when  
a state  
government  
is republican?

government . . . is one in which the will of the people is the highest source of authority and looks for its interpretation and execution to responsible agents acting under the forms of law."<sup>1</sup>

The final judge of whether the government of a state is republican is not the people of the state, but the national government. The constitution does not say which branch of the national government shall decide. Conceivably, it might be the courts. In handling cases turning on the nature of republicanism, the Supreme Court, however, has always held that the question is political in character, and hence one to be decided by the political departments of the government, not by the judiciary.<sup>2</sup> This leaves it to the president or Congress, or both. As for the president, he undoubtedly might pronounce the government of a given state non-republican and might use force to dispossess it; indeed, in the single instance in which the guaranty clause was brought into operation up to the time of the Civil War, *i.e.*, the Dorr rebellion in Rhode Island in 1841-42, the president recognized the old government of the state as the rightful government and took steps to give it the aid which it asked against a new rival government set up by an insurrectionary element.<sup>3</sup> Congress, however, has the readiest means of applying the necessary pressure; and in these days it is Congress that would be most likely, should necessity arise, to exercise the power. If Congress is of the opinion that a state's government is not republican, all that the two houses have to do is to refuse to seat the senators and representatives elected from that state. This would cut off the state from any share in making national laws and levying taxes, and would be very likely to lead to such changes in the state's system of government as would overcome the alleged objections. By refusing to seat senators and representatives sent to Washington by various southern states at the close of the Civil War, Congress, in point of fact, not only compelled those states to adopt governmental arrangements which the radical Republican majority professed to consider essential to a republican form of government, but also defeated the entire presidential plan for reconstruction on easy and moderate lines.

The question of what constitutes republican government has been raised a number of times since the Reconstruction period.

<sup>1</sup> A. N. Holcombe, *State Government in the United States* (2nd ed.), 41.

<sup>2</sup> *Pacific States Tel. and Tel. Co. v. Oregon*, 223 U. S. 118 (1912).

<sup>3</sup> *Luther v. Borden*, 7 Howard 1 (1848).

Thus, on one occasion it was contended that a state which denied the suffrage to women did not have republican government. The courts, however, held that since only one state (New Jersey) permitted women to vote at the time when the constitution was adopted—although all of the state governments were considered republican—equal suffrage for men and women cannot be regarded as essential to republican government.<sup>1</sup> Later, the initiative and referendum were attacked as being not republican, and therefore unconstitutional. Republican government, it was said, means representative government; the initiative and referendum are modes of direct legislation; hence they are inconsistent with the requirement that the governments of the states shall be republican. This argument, however, will not hold water. Madison, Jefferson, and other early statesmen undoubtedly thought of republican government and representative government as broadly synonymous. But they never said that in order to have republican government a people must make *all* of their laws through the medium of elected assemblies; and common sense forbids such a view.

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VIII

The term  
to be  
construed  
broadly

The thirteen "original" states became members of the Union by participating together in the Revolution and ratifying the Articles of Confederation and the present constitution. The other thirty-five have been brought in by a series of special acts of Congress. Considered from the point of view of the circumstances under which they were admitted, these newer commonwealths fall into four groups: (1) five which were formed by separation from other states, *i.e.*, Vermont set off from New York in 1791, Kentucky from Virginia in 1792, Tennessee from North Carolina in 1796, Maine from Massachusetts in 1820, and West Virginia from Virginia in 1862; (2) one, *i.e.*, Texas, which before its admission in 1845 was an independent nation; (3) one, *i.e.*, California, which was formed, also without passing through the territorial stage, out of a region ceded by Mexico in 1848; and (4) twenty-eight which have been formed out of pre-existing organized territories.<sup>2</sup>

Admission  
of states  
to the  
Union

The constitution confers on Congress general power to admit new states, subject only to two restrictions: (1) that no new state shall be erected within the jurisdiction of any other state, and (2) that no state shall be formed by the union of two or more states or parts of states without the consent of the legislatures of the states concerned as well as of Congress. How many states shall

Process of  
admission

<sup>1</sup> *Minor v. Happersett*, 21 Wallace 162 (1874).

<sup>2</sup> *Cf.* Chap. xxix below.

be admitted and what population a territory shall have before being admitted are left entirely to the discretion of Congress. Furthermore, the steps to be taken in admitting a state are not specified, although a simple and substantially uniform procedure has grown up. Ordinarily, the process is set in motion by the people of a territory, who, if a considerable number desire statehood, send a petition to Congress asking that the territory be received into the Union as a state. If the petition is regarded with favor, Congress passes an "enabling act" authorizing the territorial officials to arrange for a popularly elected convention to frame a state constitution. This constitution is forthwith prepared and submitted to the people. If it is adopted, it is sent to Congress for approval; and if it is there found acceptable, a resolution is passed declaring the said territory a state. Occasionally a territory omits the initial petition and comes at once to Congress with its proposed constitution.

Congressional and presidential objections

If, as has happened several times, Congress finds something to disapprove in the proffered constitution, it communicates its objections to the people of the territory, suggesting or requiring that certain changes be made. And if a definite condition is imposed, there is, of course, nothing for the territory to do but comply or wait for a change of opinion in the two houses; without the consent of Congress, no territory can become a state. The president, too, can take exception to a proposed constitution and can veto a resolution providing for admission. This is what happened in the case of the last of the forty-eight states to be admitted, *i.e.*, Arizona. Under the authority of an enabling act passed in 1910, the people of Arizona drew up and adopted a constitution which, in addition to other novel features, made provision for the recall of judges by popular vote. Many members of Congress believed that judges ought not to be subject to recall. Nevertheless, a joint resolution for the admission of the new state was passed. President Taft felt so strongly on the subject that he vetoed the resolution; whereupon another resolution was passed, in conformity with the president's ideas, providing for admission on condition that the recall of judges be stricken from the constitution. The people of the territory assented; and, having thus met the condition imposed, Arizona took her place in the Union early in 1912.

This episode also illustrates the fact, already mentioned, that, once a state is in the Union, it can proceed to throw off any restriction of a political nature that has been laid upon it as a condition

of its admission. When the people of Arizona voted to eliminate the recall of judges from the proposed constitution, it was locally understood that the alteration would be only temporary. And so it fell out. In his first message, the governor of the new state recommended a constitutional amendment reviving the recall; and before the close of the year in which the state was admitted the amendment was duly adopted by both legislature and people.

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Conditions have, indeed, been imposed on incoming states in a considerable number of instances. The Northwest Ordinance of 1787, reenacted by Congress in 1789, provided that new states created from the territory to which the ordinance applied should be admitted "on an equal footing with the original states in all respects whatever." Yet when Ohio was admitted, in 1802, the state was required to agree not to tax for a period of five years any lands sold within its borders by the United States; and a similar requirement was made of several states admitted later. Nevada was admitted in 1864 under pledge not to deny the right to vote to any person on account of color. Nebraska, three years later, was required to agree not to deny the suffrage or any other right on account of race or color, Indians excepted. Utah, when admitted in 1894, was required to make, "by ordinance irrevocable without the consent of the United States," provision for complete religious toleration, for non-sectarian schools, and for the abolition of polygamy. Oklahoma, in 1907, was required not to remove the capital from Guthrie to any other place within a period of five years—though in point of fact it actually did so. On the ground that it was in the nature of a simple agreement relating to property, a limitation binding the newly admitted state of Minnesota not to impose any tax on lands belonging to the United States, or any higher tax on non-resident proprietors than on residents, has been upheld by the Supreme Court.<sup>1</sup> On the other hand, the Court has emphatically declared that, after becoming a member of the Union, a state cannot be compelled to observe limitations of a political nature imposed upon it as a condition of its admission.<sup>2</sup> In summary, therefore, Congress may, notwithstanding the theory of state equality, require territories to meet any conditions that it sees fit to impose before permitting them to become members of the Union. But the obligations thus assumed can after-

Conditions  
imposed  
on in-  
coming  
states

<sup>1</sup> *Stearns v. Minnesota*, 179 U. S. 223 (1900).

<sup>2</sup> *Escanaba Co. v. Chicago*, 107 U. S. 678 (1833), and *Bollin v. Nebraska*, 176 U. S. 83 (1900).

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VIIIConstitutional  
limitations  
on the  
states:

wards be disregarded with impunity unless they are in the nature of compacts on such a subject as property rights.<sup>1</sup>

Except in so far as they are severally restricted by agreements entered into at the time of their admission, all states have the same kinds of authority and power, however much or little they may choose to make use of their rights in any particular direction. The mode and extent of the delimitation of state powers have been indicated in the preceding chapter. The sum and substance of the matter is that the states have all powers which the national constitution does not bestow exclusively upon the national government or otherwise deny to them. And we must now take somewhat further notice of this subject of "constitutional limitations," or positive restrictions imposed by the national fundamental law upon state action.<sup>2</sup>

1. Foreign  
and inter-  
state rela-  
tions

The national constitution unequivocally forbids a state to enter into "any treaty, alliance, or confederation," and it prohibits any "agreement or compact" between states, or between a state and a foreign power, except with the consent of Congress. Likewise, a state may not, unless Congress assents, keep troops or ships of war in time of peace, or engage in war unless actually invaded or in such imminent danger as will not admit of delay. If Massachusetts desires to enter into an agreement with Great Britain, she can do so, with the permission of Congress, provided, of course, that the effect is not to create an "alliance or confederation," i.e., a relationship of a political character. With the consent of Congress, two or more states, furthermore, may make agreements or compacts among themselves; and although the full possibilities of securing coöperation among states by this method are only beginning to be realized, several such agreements are on record—for example (a) one between New York and New Jersey in 1921 concerning development of the port of New York,<sup>3</sup> (b) one of 1922 among the seven states containing portions of the basin of the Colorado River, and having to do with the allocation of rights to the waters of that stream,<sup>4</sup> (c) one of 1925 among the states of

<sup>1</sup> W. A. Dunning, "Are the States Equal under the Constitution?," in *Essays on the Civil War and Reconstruction* (New York, 1898), 304-352.

<sup>2</sup> Some of these restrictions will be considered in the present chapter, and others, having to do with private rights, in the succeeding chapter.

<sup>3</sup> *Nat. Mun. Rev.*, X, 449-451 (Sept., 1921). For text of the agreement, see *New York Laws*, 1921, p. 492.

<sup>4</sup> E. L. Hampton, "The Seven-State Irrigation Treaty," *Curr. Hist.*, XVII, 993-1002 (Mar., 1923), containing text of the agreement. An act for the construction of the long-discussed Boulder Dam, passed by Congress in 1928, made the undertaking contingent upon the approval of this compact by at

New York, Pennsylvania, and New Jersey pertaining to the use of the waters of the Delaware River,<sup>1</sup> (d) a four-state pact (Washington, Oregon, Idaho, and Montana) of the same year relating similarly to the use of the waters of the Columbia, and (e) a three-state compact (Colorado, New Mexico, and Texas) relating to the Rio Grande River, signed in 1929 and assented to by Congress in 1930.<sup>2</sup> It should be noted, however, that the clause requiring consent of Congress is not to be taken with absolute literalness. Two or more states, acting quite independently, might agree to clean up a disease-producing district on their common border, and in point of fact, New York and New Jersey some years ago settled in this manner a long-standing dispute concerning sewage pollution of New York harbor. As construed by the courts, the restriction applies only to agreements "tending to increase the political power of the states, which may encroach upon or interfere with the just supremacy of the United States."<sup>3</sup> Furthermore, where the consent of Congress is necessary, it may be given either before or after the agreement is made, and may be either express or implied. Indeed, blanket permission to make agreements on a given subject may be given in advance, as was done in 1911 in connection with interstate compacts designed to conserve forests and water supply.<sup>4</sup>

The national constitution imposes no express and absolute limitation on the taxing power of the states. But it permits certain kinds of taxes to be levied only with the consent of Congress, and it contains several clauses of a general nature which operate to keep the taxing authorities within bounds. The taxes which may not be laid without the consent of Congress are (a) imposts or duties on imports or exports, except such as may be necessary for the enforcement of state inspection laws, and (b) tonnage duties.

2. Taxation:

least six states. The required endorsement was given, and, over the protest of Arizona, work was started in the autumn of 1930. The construction is to be known as the Hoover Dam, and is actually located, not in Boulder Canyon, but in Black Canyon, twenty miles distant.

<sup>1</sup> Ratified only by New York. A new "treaty" was signed early in 1927.

<sup>2</sup> Interstate agreements, made or pending, up to 1929 are listed in D. E. Carpenter, "Interstate River Compacts and their Place in Water Utilization," *Jour. Amer. Water Works Assoc.*, XX, 756-773 (Dec., 1928). On the initiative of President Hoover, a conference of western governors, held in 1929, gave preliminary consideration to an interstate compact looking to conservation of the nation's oil and gas supply. Steps were taken late in 1930 to create a commission to represent New York, New Jersey, and Connecticut in formulating bills preliminary to a "treaty" between the three states and the federal government to end harbor pollution.

<sup>3</sup> *Virginia v. Tennessee*, 148 U. S. 503 (1893).

<sup>4</sup> *Code of the Laws of the United States* (1926), p. 426, § 552.



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VIII(a) duties  
on imports  
and  
exports

Under the Articles of Confederation the states had the power to lay duties on imports and exports, subject only to the restriction that such imposts must not interfere with certain treaties entered into by the United States. The national government had no power of the kind whatever, and in consequence suffered untold financial embarrassments; furthermore, all efforts to remedy the defect by amending the Articles failed. Small wonder, therefore, that when the new constitution was made, one of the first decisions was to give the national government sole power to lay duties on imports (although exports were not to be taxed), with only the slight qualification which has been mentioned in favor of the states. In order to take away all financial motives, and thus to reduce to a minimum the exercise of such duty-levying power as remains to the states, it is stipulated that if a state lays any duties on imports or exports, the net yield shall be turned over to the national treasury. In addition, Congress is authorized to revise and control all state laws on the subject.

(b) ton-  
nage duties

A tonnage duty is a tax on ships levied on the basis of capacity, which is expressed in tons of one hundred cubic feet each. Vessels may be taxed independently by a state in the same way (*i.e.*, in accordance with value) that other property within the state's jurisdiction is taxed. A tax on the carrying capacity of a ship, however, is conceived of as a tax on an instrument of commerce and navigation, and can be laid only with the consent of Congress.<sup>1</sup>

(c) taxes  
on federal  
instru-  
mentalities

Another and more important limitation on the taxing power of the states arises, not from any express provision in the constitution, but from judicial interpretation of the character of the union which that instrument was meant to establish. This limitation is the principle that a state may not tax national property, tangible or intangible, or any lawful national agency or instrumentality. This rule was propounded most clearly and authoritatively in the famous decision prepared by Chief Justice Marshall in the case of *McCulloch v. Maryland* in 1819. In 1818, the state of Maryland imposed a stamp tax on the circulating notes of all banks or branches thereof located in the state and not chartered by the legislature. The Baltimore branch of the United States Bank refused to pay this tax. Suit was brought against the cashier, McCulloch, and the state court rendered judgment against him; whereupon the case was taken to the federal Supreme Court. Pronouncing the law imposing the tax unconstitutional, Marshall

<sup>1</sup> State Tonnage Tax Cases, 12 Wallace 204 (1871).

declared that, unlimited as is the power of a state to tax objects within its jurisdiction, that power does not "extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States . . . powers . . . given . . . to a government whose laws . . . are declared to be supreme."<sup>1</sup>

Maryland's attorneys argued that since the taxing power is concurrent in the national and state governments, the states can tax a national bank as freely as the nation can tax state banks. Marshall, however, declared this fallacious. "When they [the people of all the states, and the states themselves as represented in Congress] tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. . . . The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme and those of a government which, when in opposition to those laws, is not supreme. . . . If the states may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. . . . The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."<sup>2</sup>

Accordingly, the states are debarred from taxing United States bonds and the income therefrom, national franchises, the salaries of national officers, income from royalties on patents, and national property, such as lands, buildings, fortifications, and lighthouses. Under provisions of an act of Congress passed in 1864, they may, however, tax national bank stock, and likewise the physical property belonging to national banks. Such taxes, falling on property rather than on operations, are considered not to detract from the capacity of the banks to serve the government according to

<sup>1</sup> 4 Wheaton 429-430 (1819).

<sup>2</sup> 4 Wheaton 435-436 (1819).

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VIII

the intent of the laws establishing them, and on this account the legislation of 1864 has been construed to be, not a grant by the United States of a power not previously possessed (Congress has no authority to make such a grant), but rather the removal by Congress of a hindrance to the exercise by the states of a power inherent in them.<sup>1</sup>

(d) other  
restraints

Finally, it may be pointed out that state powers of taxation are in practice restricted by (1) the inability of a state to give force to its laws outside of its own boundaries, from which it results that only such property can be taxed as is within the jurisdiction of the state;<sup>2</sup> and (2) the constitutional provision (a) that no state shall "deprive any person of . . . property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws," (b) that no state shall pass any law "impairing the obligation of contracts," and (c) that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The taxing power cannot be so used as to violate any of these general restraining clauses.

3. Com-  
merce

We have seen that one of the main objects of those who urged the revision of the Articles of Confederation was to remedy the chaotic condition of commerce arising from the conflicting commercial policies of the several states and from the total lack of power of the national government to deal with the subject. The states could not have been expected to yield to any outside authority the control of trade taking place exclusively within their own borders, and no one proposed that they should do so. The need was, rather, for national power to deal with foreign and interstate trade; and in the new constitution such power was definitely conferred. The nature and methods of the national control built up on the basis of a slender, but sufficient, clause authorizing Congress to "regulate commerce with foreign nations and among the several states, and with the Indian tribes,"<sup>3</sup> will be considered at length in a later chapter,<sup>4</sup> and it must suffice here to note merely that, although the states retain complete control of intrastate commerce, such commerce is construed, very strictly, to mean only

<sup>1</sup> *Van Allen v. Assessors*, 3 Wallace 573 (1865). It should be observed that in the case of *McCulloch v. Maryland* the Supreme Court denied the right of Maryland to tax the circulation of the Baltimore branch of the United States Bank, but did not question the state's right to tax the branch's real property.

<sup>2</sup> The difficulty of determining precisely what property is within the jurisdiction of a state is described in W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), II, Chap. LX.

<sup>3</sup> Art. I, § 8, cl. 3.

<sup>4</sup> Chap. XXVII below.

commerce which originates, ends, and has its entire course in a single state. If commerce passes for but an instant beyond the state's borders, the state loses control and the laws of Congress apply. Furthermore, commerce which at any stage takes on an interstate character is dealt with as such from the moment that the transaction starts until it is completed.

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VIII

One of the main advantages of union is a common currency system. Hence the federal constitution gives the national government full control of the currency and forbids the states to coin money, to emit bills of credit, or to "make anything but gold and silver coin a tender in payment of debts." Under their reserved powers, the states can charter banks; and banking institutions so created exist beside and compete with national banks in all of the states. Furthermore, the states can authorize these banks and banking associations to issue notes for circulation. In 1866, however, this latter power was stripped of all practical significance by an act of Congress laying a ten per cent tax on such notes and thereby making it unprofitable to issue them. The Supreme Court upheld the measure,<sup>1</sup> and as a result state bank currency has passed entirely out of use.

4. Cur-  
rency

Society exists and business is carried on by virtue of a network of human relations which find expression in agreements, or contracts; and little thought is required to show how insecure and impossible our everyday existence would be if these agreements could be disregarded with impunity. It is not strange, therefore, that the framers of the national constitution put into that instrument a clause explicitly forbidding the states to pass any law impairing the obligation of contracts. They did not lay a similar prohibition on the national government; but this was mainly because it was expected that the business relationships of men would be controlled by the state governments rather than by Congress.

5. Con-  
tracts

A contract may be defined as an agreement enforceable at law; and no state legislation which weakens the obligations arising from such an agreement is valid unless considerations of public health, safety, or morals demand it or compensation is rendered for the injury done. Both the definition and the rule are, however, easier to state than to apply. Ordinary agreements, executed in due legal form, between individuals or groups of individuals are obviously included. But how about a charter granted by a state to a bank or a railroad company? Or an appointment to a public office? Or

Charters,  
franchises,  
etc., not  
included

<sup>1</sup> *Veazie Bank v. Fenno*, 8 Wallace 533 (1869).

a license to practice medicine? These and many similar questions have been passed upon in numerous judicial decisions, with results which can only be summarized here. In the Dartmouth College case, in 1819, the Supreme Court held that the charter of the college was a contract which the state legislature had no power either to revoke or to impair without the college's consent.<sup>1</sup> This meant that franchises and charters obtained from state legislatures by private corporations were within the scope of the constitutional guarantee; and corporations long tried to maintain that any withdrawal or curtailment of privileges once granted them was an illegal impairment of contract. If this contention could have been sustained, the results would have been serious. But the courts took the common-sense view that charters and franchises are, after all, only a species of property, and as such can be taken away, with compensation rendered—or even without compensation when it can be shown that paramount interests of public welfare demand it. Furthermore, it is open to legislatures, when granting new charters, to insert in them clauses making them revocable or alterable at will; and this is now usually done. Having taken this precaution, a state can act at any time with impunity, subject only to a few limitations imposed in the Fourteenth Amendment.

By judicial determination, the charters of public corporations, *e.g.*, cities and counties, investing them with subordinate legislative and other governmental powers are not contracts within the meaning of the "obligation" clause. So far as the national constitution is concerned, the state legislature can repeal them or amend them in any way at any time. Various forms of agreement between a state and its citizens are also construed not to be contracts. Thus a person who is appointed to a public office, even for a fixed term and at a definite salary, acquires no vested right; no contract is violated if the state abolishes the office altogether. Furthermore, a license issued by a state, or by one of its political subdivisions, is not a contract, but only a grant of privilege which can be legally revoked at any time.

Obligations  
of the  
states in  
their rela-  
tions with  
one  
another:

Except in so far as the national constitution has provided otherwise, the states are separate, and each is supreme within its own sphere of authority. Massachusetts cannot give force to her laws in Connecticut; an Ohio state judge cannot hold court in Indiana. Every state, however, must constantly have dealings with other states, and the populations of all of the forty-eight are perpetually

<sup>1</sup> Dartmouth College *v.* Woodward, 4 Wheaton 518 (1819).

commingling in pursuit of the various trades and professions. It therefore becomes a practical necessity that the states accept in common certain obligations toward one another. Four specific obligations were, indeed, imposed by the national constitution as originally adopted. One of them—the duty to deliver up fugitive slaves escaping from one state into another—became obsolete upon the adoption of the Thirteenth Amendment in 1865. The other three continue in effect, and pertain to (1) recognition of legal processes and acts, (2) interstate citizenship, and (3) rendition of persons accused of crime.

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“Full faith and credit,” says the constitution, “shall be given in each state to the public acts, records, and judicial proceedings of every other state.”<sup>1</sup> This means that the authorities of Illinois must recognize and observe the laws of Michigan whenever involved in any actions with which such authorities have to do. It means also that they must recognize and accept the decisions of Michigan courts, on presentation of authenticated copies of the relevant records, precisely as they would honor decisions of the courts of their own state. If it should fall to an Illinois court to enforce a decision of the kind, it would normally do so without a re-trial of the issue. To make the illustration more concrete: A. and B. are residents of Detroit. A. brings suit against B. and gets a judgment in the amount of five hundred dollars. Without paying, B. moves to Chicago, taking his property before it can be attached. Under the “full faith and credit” clause, A. can go into a court in Illinois, and with simply the judgment of the Michigan court as evidence, obtain a decree against B. for the amount of the judgment. B. may challenge the authenticity of the record; and he may demand a re-trial on the ground that the Michigan court did not have jurisdiction. But on no other ground can he secure a reopening of the case.

1. Recognition of legal processes and acts

Marriage and divorce, wills, deeds, contracts, and other civil actions come also within the scope of the requirement. Two states may have widely different laws relating to wills; yet each, as occasion arises, will accept and enforce a will made under the laws of the other. Some progress has been achieved in the direction of securing uniform state legislation in such fields as commercial transactions and family relations. But as long as our federal system exists, the authorities of any one of the states will have to be prepared to coöperate in giving effect to many laws which are

<sup>1</sup> Art. IV, § 1.

markedly different in content and spirit from those made locally. It should be noted, however, that the "full faith and credit" clause applies only to civil, as distinguished from criminal, actions; the Supreme Court holds that no state is obliged to aid in enforcing the penal laws of another state.<sup>1</sup>

The framers of the national constitution wisely felt that no state should be allowed to discriminate, in favor of its own citizens, against persons coming into its jurisdiction from other states. To do so would be inherently unjust, and would seriously obstruct the growth of national unity. Hence it is provided that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."<sup>2</sup> This means that citizens may move freely about the country and settle where they will, with the assurance that as newcomers they will not be subjected to discriminatory taxation, that they will be permitted to carry on lawful occupations under the same conditions as native citizens, that they will not be prevented from acquiring and using property, or denied the equal protection of the laws, or refused access to the courts. It does not mean that privileges of a political nature must be extended at once. "A state," said the Supreme Court in a decision handed down in 1898, "may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state who becomes a resident thereof shall exercise the right of suffrage or become eligible to office."<sup>3</sup> Moreover, the clause does not prevent a state from making quarantine or other police regulations which will have the effect of denying free ingress or egress or the right to bring property in or to take it out. But such police restrictions must be justified by provable public necessity; furthermore, they must be so framed as to fall alike upon the citizens of the given state and those of all other states. It is hardly necessary to add that a citizen of New York, migrating to Pennsylvania, does not carry with him the rights which he enjoyed in New York. The point is rather that he becomes entitled to such rights as the citizens of Pennsylvania enjoy.

A third obligation resting on the state is the rendition of fugi-

<sup>1</sup> *Wisconsin v. Pelican Insurance Company*, 127 U. S. 265 (1888); S. I. Langmaid, "The Full Faith and Credit Required for Public Acts," *Ill. Law Rev.*, XXIV, 383-422 (Dec., 1929).

<sup>2</sup> Art. IV, § 2, cl. 1. R. Howell, "The Privileges and Immunities of State Citizenship," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXXVI (1918).

<sup>3</sup> *Blake v. McClung*, 172 U. S. 239 (1898).

tives accused of crime. "A person charged in any state with treason, felony, or other crime," says the constitution, "who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."<sup>1</sup> Rendition as practiced among the states is similar to, and was suggested by, extradition as carried on from very early times in the domain of international relations. There are, however, important differences. Nations are sovereign authorities and as such practice extradition only within rather rigid limits. In the first place, they will rarely or never hand over a fugitive unless they have a reciprocal extradition agreement with the nation demanding him. In the second place, they will not surrender him unless the crime of which he is accused is one of those enumerated for extradition purposes in the treaty. Furthermore, nations usually refuse to extradite their own citizens or subjects; and by universal usage, political offenders are exempted. Finally, it has become an accepted rule that an extradited person cannot be tried for any offense other than that named in the warrant of extradition. On the other hand, rendition as practiced by the states is provided for by the national constitution, not by interstate agreements; the offenses for which an accused person is to be delivered up are broadly defined as treason, felony, and "other crimes;" states commonly give up their own citizens on proper demand; and there is no rule against trying a person so delivered up for an offense other than that with which he was charged when his delivery was requested.

The constitution says that the demand for the surrender of a fugitive from justice shall be made by the executive authority of the state from which the person fled, and an act of Congress provides that it shall be addressed to the executive authority of the state in which the accused has been apprehended. If, therefore, A. kills a man in Ohio and flees into West Virginia and is there placed under arrest, the governor of Ohio will send a requisition, accompanied by a certified copy of the indictment, to the governor of West Virginia asking the return of A. so that he may be placed on trial in an Ohio court. If the requisition is honored, the fugitive will be turned over to the Ohio police officer who has been dispatched to bring him back.

There is no positive assurance, however, that the demand will

<sup>1</sup> Art. IV, § 2, cl. 2.



be complied with. The constitution plainly says that the fugitive "shall . . . be delivered up;" and the act of Congress says, with equal directness, that it "shall be the duty of the executive authority" to cause him to be handed over. Nevertheless, the governor upon whom the demand is made actually exercises wide discretion, and many cases of refusal are on record. He may refuse on the ground that the accused will not get a fair trial if returned, or on the ground that the alleged offense is not known to the law of the refuge state; the real reason may be something different—even only a personal grudge. But in any case there is no way in which a decision not to comply can be overborne. In a case which turned on this question, the opinion of the Supreme Court, rendered by Chief Justice Taney, was that "the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this command created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the state; nor is there any clause or provision in the constitution which arms the government of the United States with this power."<sup>1</sup> In the final analysis, the obligation of rendition, while definitely imposed upon the states by the constitution, is effective only in so far as the chief executives are willing to make it so. But this does not mean that it is a dead letter, or even that it is generally ignored; on the contrary, it is observed in the great majority of cases, and when not observed is usually evaded for reasons which have substantial merit.

The history of the Confederation was filled with controversies between states regarding boundaries, commercial regulations, and other matters, and the makers of the constitution were not so optimistic as to suppose that under the new frame of government the members of the Union would always live in perfect accord. Consequently, they provided that the judicial power of the United States should extend to all "controversies between two or more states," and that in all cases in which a state should be a party (regardless of the character of the opposing party) the Supreme Court should have original jurisdiction.<sup>2</sup> As has been pointed out, interstate disputes are sometimes settled by quasi-diplomatic agreements, with or without the concurrence of Congress. But the road

<sup>1</sup> *Kentucky v. Dennison*, 24 Howard 66 (1861).

<sup>2</sup> Art. III, § 2.

to amicable adjustment by regular judicial process is always open; and many troublesome differences have been overcome in this way.<sup>1</sup>

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<sup>1</sup> The complete record to 1918 will be found in J. B. Scott [ed.], *Judicial Settlement of Controversies between States of the American Union*, 2 vols. (New York, 1918). During the next five years after this work was published, no fewer than twenty-eight suits between states, or phases of such suits, were filed with or passed upon by the Supreme Court. See *Amer. Jour. of Internat. Law*, XVII, 326-328 (Apr., 1923). The judicial character of controversies between states is discussed at length in *Kansas v. Colorado*, 185 U. S. 125 (1902).

The foregoing chapter has to do primarily with the constitutional aspects of the relations of nation and states. At a later point there will be some consideration of the outlook for the states as affected by tendencies in current legislative and administrative policy. See Chap. xxviii below.

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## CHAPTER IX

### THE CITIZEN AND HIS RIGHTS

In the eye of the law, every inhabitant of the United States is either a citizen or an alien. For a long time, however, much doubt hung around the question of what it meant to be a citizen. In its original form, the constitution used the term no fewer than seven times, but without ever once defining it. In some clauses, it spoke of citizens of states, and in others of citizens of the United States—from which it was natural to infer that there were two citizenships, whatever the relation between them might be. In earlier days, the uncertainty produced no great amount of trouble. But when the slavery controversy grew acute, the question of whether negroes were citizens, or could be made citizens, or, if made state citizens, thereby became United States citizens (or vice versa), evoked much spirited discussion; and in the famous *Dred Scott* decision of 1857 the Supreme Court, adopting the states' rights view that the two citizenships were separable, ruled that although a state might confer on a black man all the rights and privileges of its own citizenship, this did not make him a citizen of the United States.<sup>1</sup> After the Civil War, the issue centered particularly on the status of the freedmen, and in 1866 the first definition was placed in the constitution, as a section of the Fourteenth Amendment. This definition—which is still the law on the subject—reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."<sup>2</sup>

Citizenship  
as defined  
in the  
constitu-  
tion

This language, it will be observed, perpetuates the idea of two citizenships; and the Supreme Court has held that the two remain as distinct as before.<sup>3</sup> State citizenship, however, as distinguished from federal, is now of small and steadily dwindling importance.

Declining  
importance  
of state  
citizenship

<sup>1</sup> *Scott v. Sanford*, 19 Howard 393 (1857).

<sup>2</sup> It may be noted that the "persons" capable of being citizens are not confined strictly to individual men and women. Private corporations are reckoned as possessing partial citizenship. We shall not go into this matter here, but the reader who is interested will find the subject discussed in C. H. Maxson, *Citizenship*, Chaps. XI-XII.

<sup>3</sup> *Slaughter House Cases*, 16 Wallace 36 (1872).

A state may still confer its own citizenship upon persons who are not citizens of the United States. But the thing is rarely done, and to all intents and purposes there is but a single citizenship, *i.e.*, federal, or national. It would be accurate enough, and certainly less confusing, to speak of citizens of the United States, but only of residents or inhabitants of the states. In international law, it is, of course, only national citizenship that counts.<sup>1</sup>

Citizenship is acquired in various ways in different countries, but of course the most important by far are birth and naturalization. Citizenship by birth, in turn, arises from the application of one or the other of two quite different principles. Under one—known as *jus sanguinis*—a child takes the nationality of its parents, regardless of the place of its birth; under the other—called *jus soli*—nationality is determined by the place of birth, irrespective of the citizenship of the parents. The former is the rule to-day in seventeen Continental European and five Latin American countries; the latter, first introduced in England at the time of the Norman Conquest, has continued to prevail there, and has spread, as a feature of the common law, throughout the English-speaking world. In our own country, the Supreme Court declared at an early date that citizenship by birth was to be determined according to *jus soli*;<sup>2</sup> and by stipulating that all persons born in the United States and subject to the jurisdiction thereof should be considered citizens, the Fourteenth Amendment reenacted the common-law rule and incorporated it in the constitution. The rule has been held to be no less applicable to children born of alien parents who are ineligible for naturalization than to the offspring of parents who are eligible. Thus in the case of *United States v. Wong*

<sup>1</sup> As for aliens, it may be noted simply that, under established international usage, they must obey the laws and pay taxes precisely as if they were citizens. They may be denied opportunity to acquire land, and they are not allowed to vote. But so long as they remain in the United States they are as much entitled to protection of life and property as are citizens; the same avenues of redress are open to them; and they may not be discriminated against in any manner which international practice brands as unreasonable. With scant exceptions, they may, of course, become citizens. In 1920 there were about fourteen million foreign-born persons in the country, of whom less than half had been naturalized. See H. F. Gosnell, "Characteristics of the Non-Naturalized," *Amer. Jour. of Sociology*, XXXIV, 847-855 (Mar., 1929). Another term often encountered in these days is "nationals." It denotes, in a general way, all persons who, for purposes of international intercourse, are identified with a given nation. It is therefore broader than "citizens;" for example, the people of the Philippine Islands are nationals of the United States, but not citizens thereof. See p. 144 below, and C. H. Maxson, *Citizenship*, Chap. XIII.

<sup>2</sup> *Alexander Murray v. Schooner Charming Betsy*, 2 Cranch 64 (1804).

Kim Ark,<sup>1</sup> decided in 1898, the Supreme Court asserted that a child born of Chinese parents in the United States is a citizen, notwithstanding that Chinese, under United States laws, are incapable of being naturalized.

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The doctrine of *jus soli* is, however, not followed completely or exclusively. In the first place, the phrase "and subject to the jurisdiction thereof" sets up a qualification. Thus, children born to foreign diplomatic representatives in the United States are not citizens, because even though born on American soil they are considered to be subject to the jurisdiction of the state which the ambassador or minister represents, and not to the jurisdiction of the United States. Children born, however, in the United States to consuls or to other foreign citizens or subjects residing or temporarily sojourning here are held to be natural-born citizens, for the reason that, being covered by no diplomatic immunity, they are subject to American jurisdiction. In the second place, the rule of *jus sanguinis*, rather than that of *jus soli*, is applied in the case of children born abroad to any and all persons who are themselves American citizens. An act of Congress passed in 1855 provides that any child whose father was an American citizen when the child was born shall itself be deemed a citizen, even though born outside of the country's jurisdiction, provided the father has at any time resided in the United States.<sup>2</sup> The force of this act was, however, somewhat tempered by a statute of 1907 which provides that a person born abroad of American parents shall be entitled to protection from the United States only in case he shall, at the age of eighteen, have recorded at an American consulate his intention to become a resident and to remain a citizen of the United States, and shall, at the age of twenty-one, have taken an oath of allegiance to the United States. Furthermore, the United States will not protect its *jure sanguinis* citizens against the claims of the state in whose territory they were born if that state claims them as its citizens or subjects *jure soli*; and, conversely, children born of aliens in the United States are not protected against the state to which their fathers belong if it claims them as its citizens *jure sanguinis*.<sup>3</sup>

Both principles followed to some extent in the United States

The second main way in which citizenship is gained is by naturalization, which means the conversion of aliens into citizens

<sup>1</sup> 169 U. S. 649.

<sup>2</sup> U. S. Revised Statutes, § 1903.

<sup>3</sup> Another exception in former times to the application of *jus soli* was Indians living in tribal relations. Although born within the jurisdiction of the United States, such Indians could, until 1924, become citizens only by

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tion of  
inhabi-  
tants of  
annexed  
territories

by some special governmental act. Naturalization may be either collective or individual. The most usual form of collective naturalization is the extension of citizenship to the inhabitants *en bloc* of regions acquired by purchase or conquest. Down to 1898, the United States regularly conferred citizenship upon the whole body of inhabitants of the territories which it annexed.<sup>1</sup> In the case of Louisiana, Florida, and Alaska, the treaties of cession provided that the inhabitants should be admitted "as soon as possible to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." In the case of Texas, all citizens of the previously independent state were made citizens of the United States by resolution of Congress. American citizenship was conferred on the citizens of the former Hawaiian republic by an act of 1900 which established civil government in the new dependency. And in 1927 an act was approved making citizens of the bulk of the inhabitants of the Virgin Islands. On the other hand, the treaty of peace with Spain in 1898 by which the United States acquired Porto Rico, Guam, and the Philippines expressly provided that the cession of these islands should not operate to naturalize their native inhabitants, and it delegated the determination of the civil status and political rights of these insular populations to Congress. In later statutes, Congress declared the Porto Ricans and Filipinos to be citizens of their respective islands, and conferred upon the former most, and upon the latter some, of the privileges and immunities of citizens of the United States. Furthermore, the Supreme Court held that Porto Ricans were not aliens in the sense in which the term is used in the immigration laws.<sup>2</sup> So that, although full American citizenship was not conferred upon them, both Porto Ricans and Filipinos became, in international law, "nationals," no less entitled to the protection of the United States than are full-fledged citizens; and in constitutional law the distinction—at least in the case of the Porto Ricans—was in substance one without a difference. Finally, in 1917, the Porto Ricans were made "citizens of the United States."

naturalization, as in the case of other "aliens;" and at the date mentioned, a full third of the Indian population of the country still lacked citizen status. An act of Congress thereupon gave citizenship to all native-born Indians. Some 250,000 Indians living on reservations remain, however, under the guardianship of the bureau of Indian affairs in the Interior Department, and are therefore in the curious position of being both citizens and "wards." C. H. Maxson, *Citizenship*, Chap. ix.

<sup>1</sup> Except uncivilized native tribes in Alaska.

<sup>2</sup> *Gonzales v. Williams*, 192 U. S. 1 (1904).

Naturalization is, however, usually individual, rather than collective, and as practiced in all countries it involves the granting of citizenship by a court or an administrative officer after the applicant has fulfilled certain prescribed conditions. The national constitution authorizes Congress to "establish an uniform rule of naturalization;" and although it was at first supposed in some quarters that naturalization was one of the concurrent powers to be exercised by the states as well as by the nation, this view was gradually perceived to be groundless. In 1817, Chief Justice Marshall was able to declare that it was not, and "certainly ought not to be," doubted that the power is vested exclusively in Congress.<sup>1</sup>

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tion of  
individual  
aliens

The first federal statute on the subject, passed in 1790, was very brief, and for a hundred years much was left to chance, or at all events to the discretion of the naturalization authorities. As a result, the work was performed in no uniform manner and grave abuses arose. In most states, it was necessary to be a citizen in order to be a voter. Party organizations and candidates were, therefore, under strong temptation to procure the naturalization of all alien residents whose votes they could hope to control. One way of evading the law was to equip the alien with forged or otherwise fraudulent naturalization papers, and thus to get his name on the voting list. But the commonest device was to rush candidates through the naturalization process in great numbers on the eve of registration, when there was not time, even if there was the desire, to inquire closely into the merits of individual applications. It was, of course, in the cities, where aliens were most numerous, and where the naturalization authorities were close at hand, that this practice was most common; and, as a recent writer has said, the naturalization of foreigners "became one of the regular activities of the ward boss: the applicant's petition was made out for him, his witnesses were supplied, the foreigner being merely a bewildered participant in formalities which he did not understand. The handling of fifty or sixty naturalizations per hour was not a rare achievement in New York courts before the stricter rules went into force. Under such pressure all careful scrutiny of applications was out of the question; and the voters' lists of the larger cities were regularly padded with the names of persons who had not fulfilled the qualifications at all."<sup>2</sup>

Former  
abuses

<sup>1</sup> *Chirac v. Chirac*, 2 Wheaton 259 (1817).

<sup>2</sup> W. B. Munro, *Government of the United States* (rev. ed.), 96.



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IXImprovements  
since  
1906

Following an extensive investigation of the subject by a commission appointed by President Roosevelt, Congress in 1906 passed a law which regulates the conditions and methods of naturalization in considerable detail;<sup>1</sup> and while current practice still leaves much to be desired, the grosser frauds of earlier days have been pretty well eliminated. Under the general supervision of a bureau in the Department of Labor, the work of naturalization is performed by courts of designated grades, *i.e.*, all federal circuit courts of appeal and district courts, the supreme court of the District of Columbia, and all state and territorial courts of record which have a clerk and a seal and have jurisdiction in actions at law or equity in which the amount in controversy is unlimited. Canada is the only other country in which the judiciary is employed for this purpose; elsewhere the work is done, as a rule, by administrative officers. The investigating commission of 1905 pronounced the courts unsatisfactory as naturalization authorities, but added that no machinery was available which promised better results. It did, however, urge that the function should be confined to courts of greater dignity and importance than many of those then exercising it; and in line with this recommendation the proposal has repeatedly been offered that the power to naturalize be restricted to federal tribunals, which undoubtedly, taken as a group, have exercised it with more care than have the state and territorial courts. The federal courts, however, have not been above reproach; and it is further objected that the change would give an undue advantage to aliens in the larger cities, where the federal courts are chiefly to be found.<sup>2</sup>

Mode of  
naturalization

The process of naturalization is more complicated than in most other countries, and involves three main steps. The first is a declaration of intention to become a citizen, which must be filed with a duly authorized federal or state court at least two years before the applicant is given his final examination.<sup>3</sup> The second is the filing of a petition, not less than two years nor more than seven years

<sup>1</sup> *U. S. Compiled Statutes* (1918), pp. 653-661. There has, of course, been later legislation on the subject, notably acts of March 2 and 4, 1929. All existing law is brought together conveniently in *Naturalization, Citizenship, and Expatriation Laws* (Washington, Govt. Printing Office, 1929).

<sup>2</sup> The commission of 1905 discovered that a total of 5,003 state courts and 157 federal courts were naturalizing aliens. As a result of regulations imposed in the act of 1906 and later statutes, the numbers are now something less than 2,000 and 200, respectively.

<sup>3</sup> The applicant must be at least eighteen years of age when he files his first application, and must be able to prove the exact time and manner of his arrival in the country. In 1929, the fees charged the applicant at various

afterwards, affirming that the applicant has been a resident of the United States for at least five years, a resident of the county in which he applies for at least six months, and that he is not an anarchist or a polygamist. Full information must be given about both the candidate and his family (if he is married), and the application must be supported by affidavits of two citizens testifying to the applicant's period of residence and his moral character. The third step, taken not less than ninety days after the petition is filed, is the hearing and examination by the judge. During the interval the petitioner's claims may be investigated by a federal agent, and at the hearing the petitioner must himself be present to answer questions, although since 1926 it is not essential that the two sponsors be in attendance if the inspector's report upon the candidate has been favorable. The examination given by the judge will be as thorough, or as perfunctory, as he cares to make it. As a rule, it does not go beyond ascertaining that all requirements of the law have been complied with, that the candidate is not an opponent of organized government, and that he knows a few fundamental facts about the American political system. Having satisfied himself on these points, the judge authorizes the clerk of the court to issue letters of citizenship, or "final papers."<sup>1</sup>

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As was suggested above, the system is by no means perfect. The applicant must swear that he "speaks English;" but ability to utter "yes" and "no" sometimes suffices, and indeed a judge is reported to have been satisfied with a candidate who merely "nodded his head in English!" The law presumes intelligence, but provides no standards by which that saving grace is to be judged. It presupposes some knowledge of the form of government of the United States, but leaves the way open for the widest latitude in the tests imposed. In congested areas, applicants are still admitted in blocks of fifty, to the accompaniment of plenty of sharp practices, especially when an election is at hand.<sup>2</sup> A remedy that nat-

Short-  
comings  
of the  
system

stages of the naturalization process were advanced, in total, from five to twenty dollars (forty dollars in the case of candidates not possessing a certificate of admission to the country).

<sup>1</sup> H. P. Williams, "The Road to Citizenship," *Polit. Sci. Quar.*, XXVII, 399-427 (Sept., 1912). On "attachment to the principles of the constitution," as judicially construed in a number of recent naturalization cases, see *Amer. Jour. Internat. Law*, XXIII, 783-808 (Oct., 1929). One famous case—that of the "uncompromising pacifist," Rosika Schwimmer (*United States v. Schwimmer*, 179 U. S. 644)—is described in *ibid.*, 626-632 (July, 1929). Cf. D. D. Bromley, "The Pacifist Bogey," *Harper's Mag.*, CLXI, 553-565 (Oct., 1930).

<sup>2</sup> I. B. Oakley, "Scandalous Methods of Making American Citizens," *Curr. Hist.*, XXIV, 205-210 (May, 1926). Nearly a quarter of a million candidates for final naturalization apply annually.

urally suggests itself is the procuring of more complete information about applicants before they make their appearance in court. Judges and other court officials cannot do this; they are occupied with other things. But representatives of the federal bureau of naturalization can be employed for the purpose, and it is gratifying to record that under a statute passed in 1926 more use of such agents (within rather serious limitations of powers and funds) is being made to-day than ever before. The courts still naturalize, but with increasing aid from expert administrative authorities. It would be a logical step, though of course somewhat costly, to set up a system of naturalization offices under the sole control of the naturalization bureau and liberate the overworked courts from the business altogether.<sup>1</sup>

Aliens  
who are  
ineligible

Not all aliens, it must be observed, are eligible for naturalization, but only such as are "white persons or of African nativity or of African descent." This qualification bars out most Asiatics—including Filipinos.<sup>2</sup> The Chinese are expressly excluded; the Japanese are excluded by interpretation as not being white persons or of African extraction.<sup>3</sup> As we have seen, however, children born of Asiatic parents who are resident in the United States and subject to its jurisdiction are citizens by birth. Hindus have been held ineligible.<sup>4</sup> On the other hand, a federal district judge in Oregon has ruled that Armenians are eligible, and both the Department of Justice and the bureau of immigration have accepted the ruling as correct.<sup>5</sup> The eligibility of certain other classes of Asiatics is still in doubt.<sup>6</sup>

Status  
during  
and after  
naturalization

Save in two respects, a naturalized citizen stands on the same footing as a citizen by birth: he is ineligible to the offices of president and vice-president, and in the event that the nation of his former allegiance has any just claim on him, *e.g.*, for military service, he will not be protected against such claim if he re-enters that nation's jurisdiction.<sup>7</sup> The legal status of a person during the

<sup>1</sup> H. B. Hazard, "The Trend Toward Administrative Naturalization," *Amer. Polit. Sci. Rev.*, XXI, 342-349 (May, 1927).

<sup>2</sup> *Anon.*, "Status of Filipinos for Purposes of Immigration and Naturalization," *Harvard Law Rev.*, XLII, 809-812 (Apr. 1929).

<sup>3</sup> *Ozawa v. U. S.*, 260 U. S. 178 (1922); *Toyota v. U. S.*, 268 U. S. 402 (1924).

<sup>4</sup> *U. S. v. Thind*, 261 U. S. 204 (1922).

<sup>5</sup> *U. S. v. Cartozian*, 6 Fed. Rep. (2nd) 919 (1925).

<sup>6</sup> A. W. Parker, "The Ineligible to Citizenship Provisions of the Immigration Act of 1924," *Amer. Jour. Internat. Law*, XIX, 23-47 (Jan., 1925).

<sup>7</sup> This matter is less important now than formerly, because in recent years treaties have been concluded with many foreign states liberating naturalized

interval between filing his declaration of intention and presenting his final petition was long a matter of doubt. Having indicated intention to renounce his former allegiance (as he is required to do when the first step is taken), he cannot expect protection from the foreign state. Yet, not being a citizen, he is not entitled to American protection, should he go into a foreign country and become involved in controversy; and it has been ruled at Washington that such protection will not be extended. If, therefore, such a person goes abroad, he does so practically as a man without a country. As long as he stays on American soil, however, he is in certain respects better off than the alien; for example, he can acquire a homestead on the public lands, which no alien is entitled to do. In as many as twenty-two states and territories, aliens who had declared their intention to be naturalized have, at one time or another, been allowed to vote. Constitutional amendments gradually withdrew this privilege, however, and a state supreme court decision of 1926 terminated it in the last state (Arkansas) in which it survived.<sup>1</sup>

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Until recent years, an alien woman marrying a native-born or naturalized American citizen automatically became herself an American citizen, and, conversely, an American woman marrying an alien forthwith lost her citizenship. In other words, a married woman's status was determined entirely by that of her husband. As a result of persistent agitation, led by various women's organizations, this is no longer true. Prompted by growing recognition of the claim of women to their own individuality as members of the body politic, Congress in 1922 conferred upon them considerably larger rights of independent citizenship. On the one hand, an alien woman marrying an American citizen did not henceforth automatically gain American citizenship, as had previously been the case; in order to become a citizen, she must be specially naturalized. But she was given a short cut to naturalization by omis-

Citizen-  
ship of  
married  
women

Americans from all claims on them for military service by the countries of their origin. Furthermore, while this volume was in press (1931) the United States became one of twenty-two signatories of a protocol under which, so far as all adhering nations are concerned, any "person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses, and who is in fact most closely associated with that country, shall be exempt from all military obligations in the other country or countries." It was expected that there would be little or no senatorial opposition to ratification. The protocol was to become effective after being ratified by as many as ten states. Cf. J. C. Fehr, "Dual Citizenship as an International Problem," *Curr. Hist.*, XXXIII, 389-391 (Dec., 1930).

<sup>1</sup> L. E. Aylsworth, "The Passing of Alien Suffrage," *Amer. Polit. Sci. Rev.*, XXV, 114-116 (Feb., 1931). On the status of aliens generally, see C. H. Maxson, *Citizenship*, Chap. XIV.

sion of the declaration of intention, and also by reduction of the required period of residence from five years to one year; and an alien woman marrying an alien who was eligible to naturalization might be naturalized, whether her husband did so or not. A main cause of complaint, however, had always been the involuntary loss of citizenship by American women who married aliens. The act of 1922 bettered this situation by providing that if the alien was eligible for naturalization, the woman's citizenship should remain unaffected unless she chose to renounce it. And finally, a law of 1931 guaranteed retention of citizenship (unless voluntarily renounced), whether or not the husband was an eligible. Accordingly, a woman's citizenship is now determined without reference to marriage, precisely as is a man's. Any person, man or woman, can, of course, give up American citizenship by being naturalized in a foreign country.<sup>1</sup>

What  
citizenship  
means—  
rights and  
privileges

From the foregoing account of how one becomes a citizen it is but a step to the question of what citizenship means or involves. Of duties and obligations, such as loyalty, obedience, and aid—whether by paying taxes or by rendering service—it is not necessary to say more than has already been said at an earlier point.<sup>2</sup> But the query arises as to what rights, under our American system, citizen status carries with it; and this is worth looking into, not only because one of the chief ends of this and all other constitutional governments is to preserve and protect "private rights," but because there is hardly any subject upon which one hears more loose and uninformed talk. People speak glibly of the right to vote, whereas in reality there is no absolute right of the sort, but at best only a qualified right conferred on some persons and withheld from others. They speak of the right to hold public office or to practice medicine or to run a motor car, when in fact they mean only the freedom of seeking appointment or election, or of applying for an appropriate license. They wax eloquent about rights without realizing the enormous difference that exists between *rights* and *privileges*.

A person who should undertake to compile a list of the rights of citizens in the United States would have a difficult—in fact, an

<sup>1</sup> C. D. Hill, "The Citizenship of Married Women," *Amer. Jour. Internat. Law*, XVIII, 720-736 (Oct., 1924); J. L. Cable, "The Citizenship of American Women," *Atlantic Monthly*, CXLV, 649-653 (May, 1930). The second of these writers was the principal sponsor of the act of 1922, and his article cites several interesting illustrations of the workings of the measure.

<sup>2</sup> See pp. 16-17 above.

impossible—task.<sup>1</sup> He could go a considerable distance, but in the end would become lost in doubts and obscurities. Naturally, he would turn to the national constitution, and afterwards to the constitutions of the states. But what would he find? In the former, he would discover—chiefly in the first eight amendments—a long and impressive list, terminating, however, in the baffling provision of the Ninth Amendment that “the enumeration . . . of certain rights shall not be construed to deny or disparage others retained by the people.” What others? No man can say, in any conclusive manner. Similarly, he would find in most of the state constitutions articles and sections comprising “bills of rights,” besides scattered clauses pertinent to his inquiry. But in no instance would he come upon any indication that the rights mentioned form a full and exclusive list. Quite the contrary. Nor would he be helped out of his dilemma by consulting judicial decisions; for though the Supreme Court, in the Slaughter House Cases in 1872,<sup>2</sup> went into the matter in some detail, it made no pretense of covering it exhaustively. The truth is that there is nowhere, in the constitutions or outside, any enumeration that purports to be exact or complete. The national government has limited and enumerated powers. The state governments have powers not enumerated, and in many respects broader, but nevertheless limited. Under both, the people have whatever rights and liberties are expressly guaranteed them, and, in addition, all that are not definitely denied or otherwise inconsistent with the instrument under which they are claimed.

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Private  
rights  
nowhere  
enumerated  
in full

Obviously, under our federal arrangements, there are rights which can be asserted as against the national government, others which can be asserted as against state governments, and still others which can be claimed as against both. Furthermore, some rights as against state governments rest upon provisions in the national constitution restricting all state governments alike; others rest only upon provisions in state constitutions, and naturally vary somewhat from state to state; still others rest upon what are, in effect, concurrent provisions of the national fundamental law and that of a particular state. In passing to a summary of some of the more significant citizens' rights directly or indirectly recognized in our constitutional law, clearness therefore requires that rights in relation to the national and state governments be treated sepa-

Various  
categories  
of rights

<sup>1</sup> There are certain differences between the rights of citizens and of non-citizens, but they are slight and for present purposes negligible. Hence the rights described in the following pages should be understood as pertaining to law-abiding inhabitants generally.

<sup>2</sup> 19 Wallace 36.

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personal  
liberty in  
relation  
to the  
national  
govern-  
ment

rately, even though in several instances they are similar or identical. This duality is one of the penalties—or is it one of the advantages?—of a federal system of government.

Private rights, under any political system, fall into two broad categories, according as they look to the protection of (a) personal liberty against arbitrary interference by governmental authorities or (b) private property against confiscation or unlawful injury by such authorities. Taking up first the national government, we find some seven or eight main limitations in the interest of rights of a personal character. In the first place, Congress is forbidden by Amendment I to make any law “respecting an establishment of religion or prohibiting the free exercise thereof.” The Supreme Court has held that this does not confer any right to violate a criminal statute in the name of religion; for example, it does not entitle a Mormon to practice polygamy.<sup>1</sup> But so long as there is no infraction of law, freedom of belief and worship must be respected.

1. Freedom  
of religion2. Freedom  
of speech  
and press

In the second place, by the same amendment Congress is restrained from “abridging the freedom of speech or of the press.” Cultural advancement and free government alike presuppose full liberty of the people to engage in discussion, to write, and to print; and the makers of our constitutional system meant to prevent the rise of any censorship such as would stifle the interchange of opinion and stop political discussion and criticism. No guarantee of a right better illustrates, however, the conditional basis on which all private rights ultimately rest. It was manifestly not intended that freedom of speech and press should extend to the incitement of insurrection, the encouragement of disobedience to law, the defamation of the government, or the instigation of foreign states to make war upon the United States; and the constitution had been in operation less than a decade before Congress passed a Sedition Act (1798) laying heavy penalties upon encouraging insurrection or other disorder, publishing “false and malicious writing against the government,” or inciting any foreign power to make war upon the country. This particular measure flowed from an unfortunate outburst of Federalist partisanship, and after the Jeffersonian Republicans came into power they not only repealed it but liberated the prisoners held under it and secured a remission of the fines that had been paid. Legislation on similar lines has, however, been deemed necessary on several later occasions, particularly during

<sup>1</sup> *Reynolds v. United States*, 98 U. S. 145 (1878). For some of the problems that arise, see C. H. Maxson, *Citizenship*, Chap. xv.

periods of war. In the course of the Civil War, the "war powers" of the government were construed to extend to the suppression of newspapers, the arrest and imprisonment of editors, and the punishment of speakers accused of encouraging rebellion or seeking to weaken the morale of the Unionist cause. And during the World War, an Espionage Act of 1917 and a Sedition Act of 1918 laid heavy penalties, not only on all persons who, by speaking or writing, sought to turn sentiment against the war, but on all who wrote, printed, or published any "disloyal, profane, scurrilous, or abusive" language about the constitution or form of government of the United States. Although regarded by many people as both objectionable and unnecessary, these measures were enforced vigorously, and when tested in the courts were fully sustained. Fundamentally, speech and press are free. Even in normal times, however, there are limits; freedom must not become license. In wartime, the bounds to which curtailment may go are fixed only by the dictates of military necessity.<sup>1</sup>

Still another guarantee contained in the first amendment is the "right of the people peaceably to assemble, and to petition the government for a redress of grievances." This right is deeply rooted in English and colonial experience, but has nevertheless been the subject of notable controversies in later times, especially as to whether the right to present a petition involves the right to have it heard and considered.<sup>2</sup> Theoretically, such a deduction would seem obvious, but in practice it does not follow. Congress is flooded with petitions every year on all manner of subjects. They are received and referred to the appropriate committees, but pigeonholed and rarely heard of afterwards. The same thing happens in parliamentary bodies everywhere.

3. Assem-  
bly and  
petition

A fourth guarantee is immunity from bills of attainder.<sup>3</sup> A bill of attainder is a legislative measure which inflicts punishment without a judicial trial. The device was employed frequently in England during the political struggles of the seventeenth century, when not only were persons arbitrarily "attainted" of treason and sent to the scaffold by simple act of Parliament, but their descendants were made incapable of holding office and were

4. Bills of  
attainder  
forbidden

<sup>1</sup> The principal book on the subject—inspired by the experience of 1917-20—is Z. Chafee, *Freedom of Speech* (New York, 1921). For briefer discussion, see C. H. Maxson, *Citizenship*, Chap. xvi.

<sup>2</sup> This question was very prominent during the earlier stages of the movement for the abolition of slavery. See J. W. Burgess, *The Middle Period*, 253-296.

<sup>3</sup> Art. I, § 9, cl. 3.



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in other ways shorn of civil rights. The authors of our national constitution felt that, aside from removal from office as a result of impeachment, punishments ought to be inflicted only in pursuance of the verdict of a court of proper jurisdiction. Hence, nation and states alike are forbidden to pass bills of attainder in any form.<sup>1</sup> It may be added that the practice has gone out of use in almost all civilized countries.

## 5. Ex post facto laws forbidden

Similarly, there is full protection against ex post facto legislation. An ex post facto law, as defined by the Supreme Court, is one which "makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action;" or one which "aggravates a crime, or makes it greater than it was when committed;" or one which "changes the punishment, and inflicts a greater punishment than the law annexed to a crime when committed; or, finally, one which "alters the legal rules of evidence and requires less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender."<sup>2</sup> Ex post facto legislation is therefore criminal legislation passed after the alleged crime was committed, which, if brought to bear against an accused person, would be to his disadvantage; and the enactment of such legislation is expressly forbidden to both the nation and the states. Retroactive legislation on civil matters, and retroactive criminal legislation which is not detrimental to an accused person, is, however, permissible.

## 6. Treason defined in the constitution

In the next place, the citizen is relieved from any possible danger of being adjudged a traitor under some impetuous or partisan act of Congress; for treason is defined by the constitution, and Congress has no power to add to the definition. As so defined, it consists only in levying war against the United States or adhering to the country's enemies, giving them aid and comfort.<sup>3</sup> No person may be convicted of treason except on the testimony of two witnesses, or on confession in open court; and while Congress fixes the penalty, it cannot in doing so invalidate any inheritance of the traitor's property.<sup>4</sup>

## 7. Limits on searches and seizures

Again, there is the valued right of the people, as guaranteed in the Fourth Amendment, to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

<sup>1</sup> *Cummings v. Missouri*, 4 Wallace 277 (1866).

<sup>2</sup> *Calder v. Bull*, 3 Dallas 386 (1798).

<sup>3</sup> Art. III, § 3, cl. 1.

<sup>4</sup> *Bigelow v. Forrest*, 9 Wallace 339 (1869).

Since the passage of the Volstead Act in 1919 to give effect to national prohibition, hardly any provision of the constitution has been brought into more frequent and animated discussion. The guarantee is bracketed with a requirement that no search warrants shall issue except upon "probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized;" and innumerable disputes have arisen as to whether in tracking down violations of the prohibition law federal officers have been properly equipped with warrants or have conducted searches or made seizures of an "unreasonable" character. A rapidly growing line of judicial decisions touching various angles of the matter—searches without warrants, seizure of letters or of liquor by stealth, "listening in" on conversations between bootleggers and their patrons, etc.—have added many novel elements to our ever-expanding constitutional law.<sup>1</sup>

An important group of restrictions in behalf of private rights has to do with proceedings against persons accused of crime under federal law. A person in civil life may be held to answer for "a capital or otherwise infamous crime" only on "a presentment or indictment of a grand jury;" in a criminal prosecution, he is entitled to a speedy trial, by an impartial jury of the state and district wherein the crime has been committed; and he has a right to be confronted with the witnesses against him, to have counsel for his defense, and to avail himself of compulsory process for obtaining witnesses in his favor. No one, furthermore, may be compelled in any criminal case to be a witness against himself; no one may "be deprived of life, liberty, or property without due process of law;" excessive bail may not be required, or excessive fines imposed, or cruel and unusual punishments inflicted; and no one may be twice put in jeopardy of life or limb for the same offense. In civil suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury must be

8. Judicial  
processes  
restricted

<sup>1</sup> See, for example, *Carroll v. United States*, 267 U. S. 132 (1925); *Byars v. United States*, 273 U. S. 28 (1927); and a famous wire-tapping case, *Olmstead v. United States*, 277 U. S. 438 (1928). Cf. H. B. Wilson, "Search and Seizure under National Prohibition," *Const. Rev.*, XII, 189-198 (Oct., 1928); C. H. Maxson, *Citizenship*, 318-323. The problem has, of course, long been important in connection with customs, internal revenue, counterfeiting laws, the Harrison Narcotic Act, etc. It is chiefly the alleged whittling down of personal immunities in relation to searches and seizures that has inspired the widespread notion that civil liberties in this country are a vanishing quantity—a point of view reflected in a growing literature of protest, e.g., J. A. Ryan, *Declining Liberty* (New York, 1927), and H. A. Johnston, *What Rights are Left?* (New York, 1930).

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preserved. And, finally, the privilege of the writ of habeas corpus cannot be denied except when public safety, in times of rebellion or invasion, requires its suspension; that is, any person held by federal authorities must normally be given a preliminary hearing before a proper tribunal.<sup>1</sup>

"Due  
process  
of law"

In many ways, the most fundamental of these judicial guarantees is "due process." The Fifth Amendment forbids the national government, as just noted, to deprive any person of life, liberty, or property without due process of law; and in 1868 the Fourteenth Amendment imposed the same restriction upon the states. "Due process" has, therefore, become a palladium of private rights as against all governmental authorities. Notwithstanding its importance—perhaps it would be better to say *because* of its importance—the phrase has never been officially or legally defined; and the attempt to apply it to the multifold actions and relationships of life has given rise to a stupendous amount of litigation. In his argument before the Supreme Court in the Dartmouth College case, Daniel Webster asserted that due process is a principle according to which law "hears before it condemns, . . . proceeds upon inquiry, and renders judgment only after trial."<sup>2</sup> The jurist Cooley expressed the same idea when he said that "in each particular case [due process] means such an exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs."<sup>3</sup>

Due  
process  
not defined  
by the  
courts

But the courts have not cared to attempt to frame any general definition. Rather, they have preferred, as the highest federal tribunal has said, that "the full meaning [of the phrase] should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise."<sup>4</sup> This attitude has been taken principally because the unending variety of forms assumed by the question as new situations come up makes it impossible to frame a definition that will long have any claim to exactness, and because the interests of justice and progress demand that this rule, more than any other, be kept flexible and adaptable.

<sup>1</sup> Amendments V-VIII and Art. I, § 9, cl. 2. These provisions do not apply to cases arising in the army or navy, or in the militia when in the active service of the United States. See C. H. Maxson, *Citizenship*, Chaps. XIX-XX.

<sup>2</sup> 4 Wheaton 581 (1819).

<sup>3</sup> *Constitutional Limitations which Rest upon the Legislative Power of the States* (5th ed., Boston, 1883), 436.

<sup>4</sup> *Twining v. New Jersey*, 211 U. S. 78 (1908).

Besides, it may be observed that due-process questions usually come to the courts in such form as to call for only a negative sort of definition. An individual or a corporation objects to some administrative or legal transaction on the ground that due process has not been observed and that loss has been suffered on that account; and the thing that the court is called upon to determine is, not the scope of due process in general, but simply whether the action in question was or was not, so far as it went, due process.

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Due process, however, plainly forbids any judicial or quasi-judicial action against life, liberty, or property not carried out in accordance with the general rules established in our system of jurisprudence for the security of private rights.<sup>1</sup> In relation to procedure, this means the hearing of every issue, before it is decided, by an authority vested with the appropriate power. It does not, however, necessarily include exemption of an accused person from compulsory self-incrimination,<sup>2</sup> or the right of the accused to be confronted at the time of trial with the witnesses against him,<sup>3</sup> or an opportunity to appeal from a lower to a higher court.<sup>4</sup> In civil matters, the requirements of due process are regarded as having been met if the regular, recognized course of judicial proceedings has been observed.<sup>5</sup>

What due  
process  
means in  
practice

The list of constitutional limitations in the domain of the national government designed to protect personal liberty is thus long and impressive; and although war-time conditions—as in 1917-19—usually impose a severe strain upon the fabric, the protection which the citizen receives from this source is one of the outstanding features of our political system. Along with the protection of personal liberty goes, moreover, protection of property. It is left to the states to say what constitutes property,<sup>6</sup> but, taking property as defined by them severally, the national constitution throws round it—as do also the state constitutions, on their part—a shield of protective stipulations. First of all, the due process

Rights of  
property  
in relation  
to the  
national  
government

<sup>1</sup> *Hagar v. Reclamation District*, 111 U. S. 701 (1884).

<sup>2</sup> *Twining v. New Jersey*, 211 U. S. 78 (1908).

<sup>3</sup> *West v. Louisiana*, 194 U. S. 258 (1904). This right exists in the federal courts under the Sixth Amendment, but not in the state courts.

<sup>4</sup> *McKane v. Durston*, 153 U. S. 684 (1894).

<sup>5</sup> The general subject of due process, in relation to both substantive and procedural rights, is treated conveniently in C. H. Maxson, *Citizenship*, Chaps. XXII-XXIII.

<sup>6</sup> Save that through its exclusive power to grant patents and copyrights the national government can practically define property in inventions and publications. The only restriction upon the states in this matter is that, under the Fifteenth Amendment, they cannot establish or recognize property in man or man's labor, *i.e.*, slavery or involuntary servitude.

clause, already mentioned, applies to deprivation of property, equally with that of life and liberty. In the second place, all duties, imposts, and excises must be uniform—that is, must be made to fall upon the same kinds and amounts of property with equal weight, in all parts of the country.<sup>1</sup> Third, Congress cannot impose any tax or duty on goods exported from a state.<sup>2</sup> Fourth, no money may be drawn from the Treasury except in pursuance of “appropriations made by law.”<sup>3</sup>

Finally may be mentioned the limitations placed upon exercise of the right of eminent domain. This right involves the power to take private property for public use, with or without the owner's consent. The power is one which every government must have. In the absence of constitutional restraints, however, it would be peculiarly susceptible of abuse: the compensation might be inadequate; indeed, compensation might be denied altogether. Hence, the Fifth Amendment forbids private property to be taken for public use without “just compensation.” The courts, it is true, have usually interpreted this provision very broadly. For example, they uphold the taking of land not only for purposes which are strictly governmental, *e.g.*, the erection of a custom-house, but for purposes which have any clear relation to governmental functions, *e.g.*, the creation of a park; and they raise no objection to the exercise of the power by a railroad or other corporation upon which the government has bestowed it, so long as the same conditions are observed that the government itself would be required to meet. Nevertheless, it is always necessary to show that the purpose is “public,” and to make “just compensation.” What is to be considered just compensation in a particular case is likely to be a matter for judicial or administrative determination. The government or corporation will ordinarily make the owner an offer. This is very likely to be refused. Counter-proposals and mutual concessions may lead to an agreement, as in an ordinary sale. But if they do not, the owner can appeal to the courts, which will fix the amount which he may receive and must accept; or the decision may be reached by commissioners or other administrative boards. All that is necessary to meet the requirements of the constitution is that the dissatisfied seller shall have an opportunity to be heard on the subject and to present such evidence concerning the value of his property as he may desire to bring forward.<sup>4</sup>

<sup>1</sup> Art. I, § 8, cl. 1.<sup>2</sup> Art. I, § 9, cl. 5.<sup>3</sup> Art. I, § 9, cl. 7.<sup>4</sup> *United States v. Jones*, 109 U. S. 513 (1883).

Extensive as they are, the guarantees of private rights thus far enumerated do not exhaust the resources of the national constitution. As we have considered them, they operate as restrictions upon the national government only. The citizen, however, has protection also as against the government of his state; and while his immunities in this direction rest to a considerable extent upon provisions of the constitution of the particular state, they also flow in part from restrictions which the national constitution itself imposes upon all of the states.

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Protection  
of rights  
in relation  
to state  
govern-  
ments

First among these latter restrictions is the obligation to recognize and uphold interstate citizenship, which means, as we have already seen, that a state may not discriminate, in favor of its own citizens, against persons coming within its jurisdiction from other states. In the second place, the Fourteenth Amendment forbids the states to "make or enforce any law abridging the privileges or immunities of citizens of the United States." Inasmuch as practically all citizens are citizens of state and nation simultaneously, the benefit of both of these provisions accrues to substantially the whole body of the people; and, taken together, they confer, among other things, the right to move freely from state to state; to establish a residence in any state, and to be dealt with like other residents there; to own personal and real property in any state; to sue in the federal courts and in the courts of the state in which one resides; to have free access to the state government and hold its offices if duly elected or appointed thereto; and to have the protection of the state government no less than that of the national government, within its proper sphere, and equally with all other persons within the state's jurisdiction.

No law  
abridging  
privileges  
of citizens  
of United  
States

Other national limitations upon the states, in the interest of private rights, will occur to readers of the foregoing pages. There is, for example, the prohibition of legislation impairing the obligation of contracts—a restriction which indeed, as has been explained, applies only to the state governments, and not to the national government.<sup>1</sup> There is also the prohibition of bills of attainder and of ex post facto laws—in these cases, restraints which fall equally upon state and nation. And to the provision of the Fifth Amendment that the national government shall deprive no person of life, liberty, or property without due process of law, the Fourteenth Amendment, as has been pointed out, adds an identical limitation upon action by the states.

Other re-  
strictions

<sup>1</sup> See pp. 129-130 above.

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"Due  
process"  
in relation  
to the  
states

This matter of due process is, in fact, considerably more important in relation to the state governments than to the national government. This is because the former, in the main, exercise that wide range of authority which we know as the police power, and because the exercise of this power is peculiarly liable to contravene the principle of due process, or at all events to bring it into question. The matter is the more troublesome for the reason that, just as the courts refuse to attempt any general definition of "due process," so they find it impracticable to mark out any very definite boundaries for the police power, preferring, rather, to decide when controversy arises whether any given act is to be construed as coming within the scope of that power. Under commonest usage, however, the police power is viewed as including all regulative authority designed to promote the order, safety, health, morals, and general welfare of society; and among the most frequent concrete applications of it are laws on sanitation, on public morals, on dangerous or objectionable trades, on zoning and housing, on railways and other common carriers, on hours of labor and minimum wages. When, however, a state undertakes to regulate the rates and services of public utility corporations, or to protect the health of women and children by restricting the number of hours a week that they can lawfully be employed in a factory, or to restrain citizens from making use of their property in ways considered deleterious to public health or morals, it is not unlikely to find itself accused of having deprived individuals or corporations of liberty or property, or both, without due process of law; and, a test case being brought, it falls to the courts to determine whether or not the objection is well founded. Manifestly, great latitude of judgment is open to the judicial authorities in handling cases of this type. Due process is undefined; the police power is likewise undefined; and the variety of circumstances that may have to be taken into account is limitless. The personal opinions, susceptibilities, and social philosophies of the judges, therefore, have profound influence upon the decisions rendered, and a court to-day may take a position diametrically opposite to that taken by it at an earlier time. It is not merely a question of settling disputes at law; it is a matter of fixing public policy.<sup>1</sup>

Speaking broadly, the Supreme Court, in passing upon due

<sup>1</sup> The police power as wielded by both state and national governments is analyzed in a clear and readable fashion in C. H. Maxson, *Citizenship*, Chaps. xxvi-xxviii.

process cases, has held the states within narrower bounds in exercising their police power than they would have been likely to observe of their own accord. Thus, when the legislature of New York, in 1897, passed an act forbidding employees to work in bake-shops more than sixty hours a week or ten hours a day, the Court held the provision unconstitutional, on the ground that it was an "unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to labor."<sup>1</sup> This "right and liberty," it was considered, had been taken away in contravention of due process; although, twelve years later, an Oregon law restricting the hours of labor in manufacturing establishments to ten, and applying to both sexes, was upheld.<sup>2</sup> Again, when the legislature of Kansas sought to make it a misdemeanor for an employer to threaten to discharge an employee because he was a member of a trade union, the Court pronounced the statute invalid.<sup>3</sup> When Arizona undertook to forbid the use (under certain circumstances) of injunctions in connection with labor disputes, that measure also was overthrown.<sup>4</sup> A District of Columbia minimum wage law was declared invalid in 1923,<sup>5</sup> and an Oregon law of similar nature was sustained in 1917 only by the narrowest possible margin, *i.e.*, a four-to-four division of the Court.<sup>6</sup> In applying the due process clause to state legislation, the Supreme Court therefore wields a great amount of control over the whole development of industrial and other economic legislation; and dissatisfaction with the generally conservative use which is made of this authority has become a main impetus to the demand so frequently heard in our day for curbing the tribunal's powers.<sup>7</sup>

Finally, as has been pointed out, private rights are not wholly dependent upon protection extended by the national constitution. Through the medium, chiefly, of bills of rights, interpreted and amplified by statutes and judicial decisions, the states themselves add numerous guarantees on their own account, each in relation exclusively, of course, to the actions of its own legislature and officials; and with forty-eight different systems of state-determined

Private  
rights  
guaranteed  
also by  
the states

<sup>1</sup> *Lochner v. New York*, 198 U. S. 45 (1905).

<sup>2</sup> *Bunting v. Oregon*, 243 U. S. 426 (1917).

<sup>3</sup> *Coppage v. Kansas*, 236 U. S. 1 (1915). Similar laws of fourteen other states were made void by this same decision.

<sup>4</sup> *Truax v. Corrigan*, 257 U. S. 312 (1921).

<sup>5</sup> *Minimum Wage Board v. The Children's Hospital*, 261 U. S. 525 (1923). This law was, of course, passed by Congress, in its capacity of legislature for the District.

<sup>6</sup> *Stettler v. O'Hara*, 243 U. S. 629 (1917).

<sup>7</sup> See pp. 509-511 below.



private rights in operation—overlaid as they are with the nation-wide system outlined above—our general scheme of rights becomes exceedingly complex. To a considerable extent, however, the matters on which the state constitutions offer protection as against the state governments are the same as those on which the national constitution affords protection as against the national government. For example, while the guarantee of freedom of religion mentioned earlier applies only in relation to the national government, practically all of the states, on their own part, maintain guarantees of similar or identical nature. The First Amendment forbids only Congress to make any laws abridging freedom of speech and press. So far as this provision goes, therefore, any state is free to impose such restrictions as it likes; and, as every one knows, public speakers are often arrested and publications suppressed by municipal and other local officials acting under state authority. Most of the states, nevertheless, have guarantees of their own on these matters. So it is with the right of assembly, of petition, and of judicial or administrative relief in cases involving exercise of the power of eminent domain; the provisions of the national constitution apply only as against the national government, and the states severally supply such guarantees on their own part as they desire. So it was, indeed, with even the supremely important guarantee of due process until 1868, when, as has been pointed out, the Fourteenth Amendment laid upon the states for the first time the same obligations in this respect that the Fifth Amendment had imposed upon the national government practically from the beginning. A conspicuous effect of the Fourteenth Amendment was, in fact, to extend the reach of the national government, in the protection of private rights as in a number of other respects, far out into the domain previously occupied by the states independently. As a result, the range of initiative and discretion on the part of the states in dealing with private rights—particularly in relation to social and industrial matters—has become decidedly narrower than in the earlier days of the republic.

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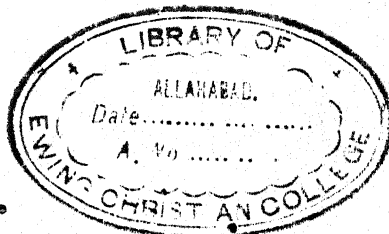
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## CHAPTER X

### HOW THE CONSTITUTION GROWS

A document  
with a  
brief  
biography

Among written national constitutions now in operation in various parts of the globe, none is older than the one which came from the hands of Madison, Hamilton, and their co-laborers at Philadelphia in 1787. This document, furthermore, has undergone relatively little textual change in these hundred and forty years. A few brief passages—amounting to perhaps one-seventh of the whole—have been rendered obsolete by amendment, and enough new matter has been added to fill three or four pages of print. Some of these changes flowed from long and heated controversy, and even from civil war; a few are vitally significant. On the whole, however, the biography of the constitution, viewed merely as a document, is brief. The “bundle of compromises” still stands largely intact.

Extensive  
constitu-  
tional  
changes  
neverthe-  
less

But this does not mean that the constitutional system under which we live is practically the same as that which George Washington swore to “preserve, protect, and defend.” On the contrary, it is so different that a Washington or a Jefferson returning to earth would doubtless view it with mingled amazement and incredulity. Though drafted with extreme care, the original instrument was necessarily couched in broad terms, and hence left much to be supplied by later interpretation and accretion. Within two years after it took effect, equally conscientious and capable statesmen were construing some of its most important clauses in diametrically opposite ways. Furthermore, in a developing country like the United States, changes of population, wealth, economic interests, political processes, and social attitudes create a new world almost with every passing generation. No constitutional text applied only on preconceived and literal lines could long withstand the impact of such unforeseen and pressing problems as arose after 1789, and the new constitution was saved from the fate of the earlier Articles only because it was more capable of formal amendment, and also (and chiefly) because it was susceptible of indefinite expansion and adjustment through interpretation, usage, statute,

and judicial decision. In practical application, the fundamental law as painstakingly written out by Gouverneur Morris became hardly more than a series of guide-posts marking points of departure from which the development of the actual working constitution, in the larger meaning of the term, has proceeded; and while any study of the making of this greater constitution of to-day must start with a glance at the formal amendments introduced in the original document, it must quickly advance to a survey of the richly clustering principles and rules, derived from statutes, executive orders, judicial decisions, and usage or custom, by which the seven articles and their amendments are overlaid and enveloped. Every generation takes over the constitution as transmitted to it from earlier days, and remakes it to fit its own ideas and needs.<sup>1</sup>

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The men who toiled through the convention of 1787 had considerably less faith in the constitution's perfection than have many people nowadays who seem to deprecate all criticism of it. Indeed, they did not regard it as perfect at all, and they deliberately invited improvements in it by providing as many as four different ways in which it could be amended.<sup>2</sup> Even if they had thought it in all respects satisfactory at the moment, they would have been statesmanlike enough to know that conditions and needs then undiscernible beyond the horizon would certainly make alterations desirable. At the same time, they did not want the process of amendment to be so easy as to tempt to hasty and ill-considered change. Accordingly, they devised alternative methods, as follows: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."<sup>3</sup> At one stage of the convention's deliberations, Roger Sherman suggested that the consent of all of the states be re-

Provisions  
for amend-  
ment

<sup>1</sup> The state constitutions have developed on similar lines, although formal amendment, including total revision, has played a larger part.

<sup>2</sup> Hamilton devoted almost an entire number of *The Federalist* to arguing that the amending process could not be made any easier without inviting constitutional instability. No. LXXXV (Lodge's ed.), 544-552.

<sup>3</sup> Art. V.

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XState  
requests  
for a con-  
vention

quired for ratification. This, however, would have meant to perpetuate the mistake made in the Articles of Confederation; and when James Wilson brought forward a counter-proposal that the assent of only two-thirds be required, a compromise was reached on the present basis of three-fourths.

Although two methods of initiative and two methods of ratification are provided for, all amendments thus far adopted have been proposed and ratified in the same way: all have been proposed by Congress and ratified by the state legislatures. This does not mean, however, that there have not been plenty of attempts to bring the alternative methods into play. More than two-thirds of the state legislatures have at one time or another appealed to Congress to call a convention.<sup>1</sup> Sometimes such a request has been made in behalf of a particular proposed amendment, as, for example, in more than two score instances in which the thing aimed at was the popular election of United States senators, or as in more recent instances of the kind looking to the repeal of the Eighteenth Amendment. Sometimes the object has been more general, as in the case of appeals made by different states at the time of the nullification controversy of 1832, and again in 1859-60 when civil war was impending. The argument has sometimes been advanced, by opponents of the Eighteenth Amendment chiefly, that every request for a convention made at any time by a state should be regarded as still pending—which would mean that the necessary two-thirds has been attained and that Congress ought forthwith to call a convention. This “cumulative” view, however, is not held generally; even though it must be admitted that there has never been any official determination of the period of time at the end of which an appeal from a state shall be regarded as having lapsed. There is no reason to expect that two-thirds of the states will ever request a convention simultaneously, or even approximately so. Moreover, there is no way of compelling Congress to act, either now or at any other time, unless possibly by writ of mandamus. On one point, however, there is almost complete agreement, *i.e.*, that no matter what particular change, or changes, might be contemplated when it was called, a convention, once set up, would be free to go as far as it liked in proposing amendments, and might even put before the country an entirely new constitution.<sup>2</sup>

<sup>1</sup> Thirty-five, to be exact, up to 1930. See list in 71st Cong., 2nd Sess., Sen. Doc. No. 78, pp. 1-3.

<sup>2</sup> O. S. Poland, “The United States Constitution and State Legislatures,” *Curr. Hist.*, XXXII, 510-513 (June, 1930).

When voted by a two-thirds majority in both houses,<sup>1</sup> a proposed amendment is transmitted by the secretary of state to the governors of the several states, to be laid by them before the legislatures. Reports of the action taken are sent, in turn, by the governors to the State Department, which, if and when the necessary three-fourths majority is obtained, proclaims the amendment effective as a part of the constitution.<sup>2</sup> A proposal failing to get the support of three-fourths of the states continues "outstanding;" its rejection is never officially proclaimed, and states that have failed to act or, having acted unfavorably, decide to change their vote, may approve it at any time.<sup>3</sup> On the other hand, by decision of Congress, a state that has once ratified cannot reverse its action. Ohio and New Jersey undertook to recall their ratification of the Fourteenth Amendment, and New York and other states tried the same thing in connection with the Fifteenth. But Congress directed the secretary of state to treat the initial actions as final and to proclaim ratification despite attempted withdrawals. Unlike statutes, amendments are not subject at any stage to veto by the president;<sup>4</sup> and, aside from a temporary and now obsolete restriction pertaining to the slave trade, no restraint is imposed upon the amending power, save that no state may, without its consent, be "deprived of its equal suffrage in the Senate."<sup>5</sup>

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X  
\_\_\_\_\_  
Actual  
mode of  
amendment

The states were not yet safely gathered under the "New Roof," as the constitution was popularly called in early days, before proposals began to be made for "extensions of the eaves," and other more or less drastic alterations. Altogether, more than 1,300 proposed amendments were put before Congress by joint resolution during the first hundred years of the constitution's history, and 1,370 others found their way to the clerks' tables between 1889

Number  
of amend-  
ments pro-  
posed and  
adopted

<sup>1</sup> The question of whether this means two-thirds of a quorum or two-thirds of the entire membership remained in doubt until passed upon by the Supreme Court in the National Prohibition Cases in 1920 (253 U. S. 350). The Eighteenth Amendment had been proposed by a vote of less than two-thirds of the entire membership of the House of Representatives, and the attempt was being made to upset it on that ground. The court held that the provision of the constitution contemplates only two-thirds of a quorum.

<sup>2</sup> *Rev. Stat. of U. S.*, § 205; G. Hunt, *The Department of State*, 168-178.

<sup>3</sup> The Eighteenth Amendment, however, contained the unique provision that it should become operative only if ratified by the requisite number of states within seven years. This time limitation was upheld by the Supreme Court in *Dillon v. Gloss*, 256 U. S. 368 (1921).

<sup>4</sup> *Hollingsworth v. Virginia*, 3 Dallas 378 (1798).

<sup>5</sup> In the National Prohibition Cases, cited above, an attempt was made to show that there are implied limitations upon the power to amend; but the Court refused to accept this view. See C. K. Burdick, *Law of the American Constitution*, 45-48.

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and 1929.<sup>1</sup> Nowadays, anywhere from forty to seventy-five proposals are presented in the prescribed form during an average session. The total number of amendments actually endorsed by the two houses from 1789 is, however, only twenty-four, and the number ratified by the states only nineteen. Indeed it would not be far wrong to say that only nine actual amendments have been adopted, because the first ten so-called amendments were, to all intents and purposes, contemporary addenda to the original constitution rather than amendments to a finished document.

The first  
ten amend-  
ments

As submitted for ratification in 1787, the new fundamental law was almost entirely lacking in provisions (numerous enough in contemporary state constitutions) for the protection of private rights. The deficiency was promptly seized upon by the skeptics and made a leading argument against endorsement. Hamilton contended in *The Federalist*<sup>2</sup> that, on account of the limited powers granted the national government, no guarantees of the kind were needed. But most people thought differently, and of the one hundred and twenty-four amendments formally proposed by seven of the states, the great majority dealt with this subject. Madison was elected to the first Congress under pledge to use his influence to bring about the adoption of a "bill of rights," and in June, 1789, he introduced a long series of proposals looking to that end. Of seventeen amendments voted by the House, twelve were endorsed by the Senate, and ten were ratified by the states. Eight of them embodied the desired guarantees of personal and property rights; the ninth provided that the enumeration of certain rights in the constitution shall not be construed "to deny or disparage others retained by the people;" and the tenth was intended to clear up doubts concerning the distribution of powers between the national and state governments. To all intents and purposes, these ten amendments, as has been stated, belong to the main body of the written constitution, and much trouble would have been saved if they had been incorporated in it at the outset.

Eleventh  
Amend-  
ment

The next two amendments were adopted to overcome unanticipated difficulties encountered early in the constitution's history. In the case of *Chisholm v. Georgia*, the Supreme Court held, in

<sup>1</sup> The proposals between 1789 and 1889 are classified and described in the monograph by H. V. Ames listed on p. 180 below. The proposals between 1889 and 1929 are similarly classified in M. A. Musmanno, "Proposed Amendments to the Constitution," 70th Cong., 2nd Sess., House Doc. No. 551 (1929). It goes without saying that the heavy annual grist of proposed amendments contains many that are trivial and some that are palpably ridiculous.

<sup>2</sup> No. LXXIV.

1793, that a citizen of one state could sue another state in the federal courts. To people of strong states' rights views, this was shocking doctrine, and under their influence the Eleventh Amendment was adopted, in 1798, declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The prohibition is construed also to prevent a state from being sued by its own citizens in a federal court.

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X

Whether this amendment was desirable depended on the point of view. But the threatened breakdown, in 1800, of the system of electing the president, because of a tie between Jefferson and Burr, brought a change which—even though stoutly resisted at the time—looks from this distance to have been a practical necessity. The nature of the crisis, and the device adopted to prevent it from recurring, will be explained at a later point.<sup>1</sup> Suffice it to say here that the Twelfth Amendment, ratified in 1804, provided for separate balloting for president and vice-president.

Twelfth  
Amend-  
ment

The first half of the nineteenth century saw vigorous constitution making and revision in the states. But, apart from the amendment just mentioned, no change took place in the national written constitution, notwithstanding that several hundred proposals made their appearance in Congress. Then came the Civil War, and as a result of it, three amendments designed primarily to define and protect the status of a body of people newly injected into the citizenship of the republic, *i.e.*, the freedmen. These were: the Thirteenth (1865), prohibiting slavery; the Fourteenth (1868), defining citizenship, further safeguarding private rights, altering the basis of representation in Congress, and laying disabilities on ex-officials guilty of rebellion against the United States; and the Fifteenth (1870), restraining the states from abridging or denying the right to vote on account of race, color, or previous condition of servitude.

Thirteenth,  
Fourteenth,  
and Fifteenth  
Amend-  
ments

Forty-three years now passed without further alteration of the written fundamental law. Political and social ideas, however, underwent important changes, and in the last two decades these reconstructed views, reënforced by influences arising from the experience of the country in the World War, have led to a new and remarkable series of constitutional amendments. Barred from laying a tax on incomes by a decision of the Supreme Court in

Sixteenth  
Amend-  
ment

<sup>1</sup> See pp. 228-229 below.



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X

1895,<sup>1</sup> Congress, in 1909, submitted to the states a proposal that the federal legislature be authorized to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration;" and in 1913 this provision—the basis of our present federal taxation of incomes—was added to the constitution as the Sixteenth Amendment. It will be observed that the amendment does not undertake to say whether an income tax is or is not a direct tax; it simply authorizes such a tax to be laid independently of the apportionment restriction elsewhere imposed on direct taxation.

Seven-  
teenth  
Amend-  
ment

The Seventeenth Amendment, providing for direct popular election of senators, dates also from 1913. This mode of election found few supporters in the convention which framed the original constitution. But it began to be earnestly advocated as early as 1826, and after the Civil War the question drew the attention of steadily increasing numbers of people. From 1893 onwards, the House of Representatives repeatedly passed resolutions favoring the change. The Senate remained obdurate until 1912. Thereupon, however,—after disagreement on the amount of national supervision over senatorial elections had been ironed out—it yielded; and in 1913 the amendment became effective.

Eighteenth  
Amend-  
ment

The remaining two amendments were adopted after the World War, and were helped to success by war-time experiences. One, the Eighteenth, undertook to do away with the liquor traffic; the other, the Nineteenth, nationalized woman suffrage. The movement to suppress the transportation and sale of intoxicating liquors had long been going on, and by the time when the United States entered the World War eleven states had constitutional prohibition, ten had statutory prohibition, and five others were about to pass under prohibition laws or amendments. Early in 1917, Congress forbade the manufacture and importation of all spirituous liquors for beverage purposes during the period of the war; and in December of the same year a constitutional amendment was submitted to the states providing that "after one year from the ratification of this article the manufacture, sale, or transportation

<sup>1</sup> *Pollock v. Farmers' Loan and Trust Company*, 157 U. S. 429 (1895). Construing an income tax to be a direct tax, the court held it unconstitutional for the reason that by its nature this tax cannot be apportioned among the states "according to their respective numbers," as is required of all direct taxes by the constitution (Art. I, § 2). In point of fact, an income tax had been laid during the Civil War and at that time sustained by the Supreme Court as being an indirect tax.

of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is prohibited." Ratified by the requisite number of states, this amendment was proclaimed a part of the constitution in January, 1919, and was duly put into effect on January 1, 1920. The amendment roused bitter opposition and was tested from every angle before the courts.<sup>1</sup> But it was sustained; and the steady growth of the regulatory powers of the nation, at the expense of the states, received fresh illustration.

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The antecedents of the Nineteenth Amendment, dealing with woman suffrage, will be described when we come to consider the development of the electorate.<sup>2</sup> A resolution submitting the amendment in the form in which it was finally adopted was passed by the House of Representatives early in 1918. Despite earnest support by President Wilson, it was twice defeated by the Senate, mainly through the influence of southern members who felt that the question was one to be settled by each state for itself.<sup>3</sup> In the early summer of 1919, however, the two houses came into agreement, and ratification by the states proceeded with such rapidity that on August 26, 1920, the secretary of state was able to proclaim the amendment a part of the fundamental law. The new suffrage arrangements were, accordingly, effective in the national and state elections of that year. Like the Fifteenth Amendment, and in almost the same words, the new article restricts the control of the states over the suffrage—in the present instance, by forbidding the right of citizens of the United States to vote to be denied or abridged by the states (or by the United States) on account of sex.<sup>4</sup>

Nineteenth  
Amend-  
ment

<sup>1</sup> For a summary of the first cases to arise, see *Amer. Polit. Sci. Rev.*, XIV, 648-654 (Nov., 1920).

<sup>2</sup> See Chap. XI below.

<sup>3</sup> Twelve states had already adopted woman suffrage for all elections, and many others for certain local and special elections.

<sup>4</sup> Amendments which have been pushed more or less vigorously in the last ten years include a so-called "lame duck" amendment moving back the inauguration of the president and the convening of Congress to dates nearer election time, thereby eliminating the biennial "short session" of Congress (see p. 414 below); an amendment proposed by the Treasury Department in 1923 subjecting to national taxation all securities issued in the future by the states and their subdivisions; another (the "equal rights" amendment), specially urged by the National Woman's party, striking away all legal discriminations against women as such, on lines similar to the Sex Disqualification Act of 1919 in Great Britain; and an amendment excluding aliens from the count of population in the reapportionment of membership in the House of Representatives (reported favorably by the House judiciary committee on February 17, 1931). A long-sought amendment empowering Congress to "limit, regulate, and

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XObservations on  
the amend-  
ments as  
a group

From the foregoing list of nineteen adopted amendments, several significant facts emerge. (1) Except as prohibition and the taxation of incomes have necessitated the setting up of new administrative agencies, there has been little change in the mechanism of government. President and vice-president are balloted for in a different way; representatives are now apportioned among the states according to total population; senators are elected by the people instead of by the state legislatures; and qualified women have become voters in all parts of the country. But that is all. (2) The great majority of the adopted amendments relate to the matter of powers or functions, and, in the main, impose restrictions on the national government, on the state governments, or on individuals. (3) By the same token, the amendments are not primarily responsible for the phenomenal growth of governmental powers and functions that the country has witnessed. One or two specific powers not previously possessed—notably that of taxing incomes—have been directly conferred upon the national government, and one or two others—chiefly that of enforcing prohibition—follow naturally from certain general amending provisions. But for the sources of the vastly expanded powers of both nation and states to-day one must look rather to usage, statutes, and judicial decisions. (4) Certain amendments, nevertheless, have carried the national government far out into fields of economic and social regulation which it was not, in earlier days, expected to invade. One illustration is the prohibition of slavery, accomplished by the Fifteenth Amendment; another is the attempted suppression of the manufacture, sale, and transportation of intoxicating liquor for beverage purposes, as embodied in the Eighteenth. In the opinion of large numbers of thinking people—and quite apart from their views as to the intrinsic desirability of the end sought—the subject-matter of the Eighteenth Amendment does not properly belong in the constitution. Certainly it is true that for the first time in the history of the country the power of the national gov-

prohibit" child labor, proposed by Congress in 1924, failed to be ratified by any considerable number of states, becoming—it is interesting to observe—the fifth only among amendments in our history to be submitted by Congress but not approved by the requisite number of states. See T. F. Cadwalader, "The Defeat of the Twentieth Amendment," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXIX, 65-70 (Jan., 1927). For an interesting, even if not wholly convincing, argument that the constitution ought now to be revised as a whole, see W. MacDonald, *A New Constitution for a New America* (New York, 1921), Chaps. xix-xx. The only means of doing this would be a national convention called by Congress at the request of the legislatures of two-thirds of the states.

ernment—previously concerned only with matters of production (even slavery was of this nature)—was by this amendment extended to the domain of individual consumption; and it is pointedly asked whether, if sumptuary regulation of this character is to be regarded as permissible, the fundamental law may not in future be diverted farther and farther from its prime and natural function, which is that of creating a government, defining its powers and duties, and guaranteeing the rights of citizens.<sup>1</sup>

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X

(5) The mere adoption of an amendment does not necessarily make it effective. An unequivocal provision of the Fourteenth Amendment that a state's delegation in the House of Representatives shall be reduced in proportion as the state denies or abridges the right of male citizens to vote "except for participation in rebellion, or other crime" has never been enforced; and notwithstanding the Volstead Act, the Jones Act, and other rigorous legislation designed to carry out the Eighteenth Amendment, violations have from the beginning been so widespread and flagrant as to constitute a national scandal. The way was prepared for the Seventeenth, Eighteenth, and Nineteenth Amendments, respectively, by direct primary legislation under which senators were in effect chosen by the people in twenty-nine states, by state adoption of prohibition in over half of the states, and by the enfranchisement of women by state action in a dozen states. But, whereas constitutional amendments making popular election of senators and votes for women nation-wide have been accepted unequivocally and carried out to the letter, an amendment undertaking to generalize, or nationalize, prohibition has met with sturdy opposition and only partial success. The "noble experiment" may be justifiable, and in the end may succeed. But the difficulties which it has encountered show how hazardous it is to put into the constitution anything not clearly supported by overwhelming public opinion.

Amend-  
ments not  
always  
fully  
enforced

No amendment, once adopted, has ever been rescinded or revised. Repeal would, of course, necessitate the same two-thirds majorities in Congress and the same three-fourths majority of the states required for original adoption; and, but for persistent agitation for repeal or revision of the Eighteenth Amendment, the matter would be of hardly more than academic interest. Most

Amend-  
ments to  
repeal  
amend-  
ments

<sup>1</sup> The history of the prohibition amendment is sketched conveniently in M. A. Musmanno, "Proposed Amendments to the Constitution" (cited above), 225-242.

people agree that, the amending process being what it is, the requisite backing for a plan to do away with the amendment mentioned cannot now, and probably never will be, obtained. Some advocates of repeal profess, it is true, to believe that by resorting to the hitherto unused device of a constitutional convention, called by Congress in response to practically simultaneous requests by the legislatures of two-thirds of the states, the thing might be accomplished. It would appear more likely, however, that in so far as the present prohibition régime shall in future be modified, the change will come by interpretation and legislation rather than by repeal or revision of the formal constitutional provision on which it rests.<sup>1</sup>

Criticism  
of the  
amending  
process:

Madison believed that the modes of amendment agreed upon by the framers guarded "equally against that extreme facility which would render the constitution too mutable and that extreme difficulty which might perpetuate discovered faults."<sup>2</sup> On the whole, history has borne out this opinion. There has, nevertheless, been much criticism of the amending process, chiefly on two grounds: (1) that it is too slow and difficult, and (2) that it is too far removed from direct action by the people. Believing with John Marshall that the machinery is "unwieldy and cumbrous," members of Congress began as early as 1864 to introduce resolutions favoring reduction of the majorities required to propose amendments (usually to simple majorities), or of the number of states required for ratification (commonly to two-thirds), or of both; and since 1900 such proposals have been particularly numerous. A generation ago, it was rather generally believed that no more amendments would be found possible unless the amending process was itself changed. The adoption of four amendments of wide economic and social import within the space of seven years (1913-20) proved the fallacy of this assumption. Nevertheless, the demand for an easier and quicker method is still heard. To the argument that the woman suffrage amendment was carried about as soon as public

1. On  
ground of  
slowness  
and  
difficulty

<sup>1</sup> D. C. Lunt, "The Eighteenth Amendment Can be Amended," *World's Work*, LVIII, 61-64 (Sept., 1929); *idem*, "The Rising Tide of Prohibition Repeal," *Scribner's Mag.*, LXXXVII, 630-635 (June, 1930); W. B. Wheeler, "Is a Constitutional Convention Impending?", *Ill. Law Rev.*, XXI, 782-803 (Apr., 1927); F. Franklin, "Prohibition Ten Years After," *Forum*, LXXXIII, 209-214 (Apr., 1930). *Cf.* I. Fisher and H. B. Brougham, *The "Noble Experiment"* (New York, 1930); M. E. Tydings, *Before and After Prohibition* (New York, 1930); H. L. McBain, *Prohibition, Legal and Illegal* (New York, 1929); G. C. Thorpe, *National and State Prohibition Under the Eighteenth Amendment* (St. Paul, 1926).

<sup>2</sup> *The Federalist*, No. XLIII (Lodge's ed.), 275.

opinion was prepared for it, and that the prohibition amendment was adopted with remarkable celerity, considering the innovations of policy and the difficulties of administration which it entailed, the rejoinder is offered that eighteen years elapsed after the income tax law of 1894 was declared unconstitutional before an amendment authorizing such a tax could be got through, notwithstanding insistent public demand for a redistribution of tax burdens between the agricultural classes on the one hand and the manufacturing and commercial elements on the other; also that the amendment authorizing the direct popular election of senators was adopted eighty-seven years after it was first proposed, long after sentiment had widely crystallized in its favor, and, as has been indicated, only after more than half of the states had brought into use extra-constitutional means of attaining the desired object.<sup>1</sup>

The second criticism, somewhat related to the foregoing, is that the amending process is undemocratic, in that the people have no direct part in it. Public opinion may lead Congress to put an amendment before the states, and may influence the legislatures to endorse or reject it. But, contrary to arrangements in the states—where in no case (except Delaware) may a constitution be amended by legislative action alone—the people do not themselves either initiate amendments or vote on them. The fact that ratification is by geographical areas, *i.e.*, states, of widely differing population is another feature often objected to. Years ago, it was pointed out that it was mathematically possible for 673 state senators and 1,643 representatives—that is, 2,216 legislators out of a total legislative membership of 7,400—to carry a proposed amendment in the thirty-six states requisite for ratification, and, on the other hand, that the representatives of one-tenth of the people, living in thirteen thinly settled western states, could defeat an amendment desired by the remaining nine-tenths.<sup>2</sup> To-day, one-twentieth of the people could frustrate the will of nineteen-twentieths. Of course, proposed amendments never actually produce alignments as exact as these. Nevertheless, a combination of states containing by far the

2. On  
ground of  
undemo-  
cratic  
character

<sup>1</sup> It is observed, too, that the Sixteenth Amendment, before finally becoming part of the constitution, was introduced in Congress forty-two times, the Seventeenth almost two hundred times, the Eighteenth more than fifty times, and the Nineteenth almost one hundred times. On the general question, see M. A. Mussmano, "Is the Amendment Process too Difficult?," *Amer. Law Rev.*, LVII, 694-705 (Sept.-Oct., 1923); J. Miller, "Amendment of the Federal Constitution; Should it be Made More Difficult?," *ibid.*, LX, 181-205 (Mar.-Apr., 1926); and T. F. Cadwalader, "Amendment of the Federal Constitution," *ibid.*, LX, 389-402 (May-June, 1926).

<sup>2</sup> *Cong. Record*, 67th Cong., 4th Session, pp. 5387-5388 (1923).

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X

Proposed  
changes

greater part of the people of the country can always be overborne by a combination consisting of a larger number of states but decidedly fewer people, with the inevitable result of keen dissatisfaction, as in the case of the prohibition amendment.

Experience shows that it is decidedly more difficult to procure the submission of amendments by Congress than to bring about ratification of them by the states. Most of the proposals for change now current look, however, to both easing up the requirement for submission and popularizing the mode of ratification; and many of them follow the main lines of a plan brought forward by Senator La Follette in 1912 providing (1) that an amendment should be submitted (a) if approved by a simple majority vote of both houses of Congress, or (b) if proposed by the legislatures of any ten states, or (c) if initiated by the voters of any ten states, and (2) that, however proposed, an amendment should become effective upon ratification, not by the legislatures, but by a majority of the popular vote on it in a majority of the states, provided that the aggregate of these state majorities should also constitute a majority of the votes cast on the measure throughout the country as a whole. Ratification would thus be by popular referendum, already extensively employed in a similar way in the states; and it is interesting to note that Ohio, in an amendment to her constitution in 1918, sought to require that all ratifications of federal amendments by that state should be preceded by referenda—although, since the amendment was designed to overturn a legislative ratification already given, the federal Supreme Court subsequently declared it void.<sup>1</sup>

Major  
changes  
not  
probable

On the whole, it would not appear that any important change in existing amending procedure is likely. The experience of the past twenty years has created a rather distinct impression that the constitution can, after all, be altered quite easily enough, and in fact an increasing number of proposals look to slowing up, if not otherwise making more difficult, the amending process, especially

<sup>1</sup> Hawke v. Smith, 253 U. S. 221 (1920). The Democratic national platform of 1924 said: "We favor granting the right to the people of the several states to vote on proposed constitutional amendments." In the same year, the House judiciary committee reported an amendment providing (1) that the members of at least one house in each of the legislatures which may ratify constitutional amendments shall be elected after such amendments have been proposed, (2) that any state may require that ratification by its legislature be subject to confirmation by popular vote, and (3) that, until three-fourths of the states have ratified or more than one-fourth of the states have rejected or defeated a proposed amendment, any state may change its vote. Cf. W. A. Robinson, "Advisory Referendum in Massachusetts on the Child Labor Amendment," *Amer. Polit. Sci. Rev.*, XIX, 69-73 (Feb., 1925).

as it pertains to ratification. It is pointedly observed that the national constitution performs a function essentially different from that of the state constitutions, and should be less flexible than they; this function being primarily that of drawing a line between national and state powers—a line which, in so far as the written constitution can control it, is, and should be, subject to only infrequent variations. And it is widely felt that, if the national amending machinery moves slowly, it moves no more so than is desirable; otherwise, some of the innumerable ill-considered proposals that are offered would probably be adopted. Once an amendment is in the constitution, it is there practically forever, and it is best that the people consider long and carefully whether they really want it. Much could be said for fixing a time limit within which the process of ratification must be completed. But this can be done without an amendment, and, as we have seen, was actually done in the case of the prohibition amendment. It would be an improvement if amendments were acted on in the states only by legislatures elected subsequent to submission, so that the people might have the proposals before them when electing their senators and representatives. But the states can apply this principle now if they so desire.<sup>1</sup> Better even than this would probably be the use, as ratifying agencies, of conventions in the states, rather than the legislatures; for the legislature is necessarily elected primarily with reference to state affairs, and a specially chosen convention would yield the substantial benefits of the referendum plan without involving its disadvantages. But this again would require no constitutional amendment, being an alternative device for which the constitution already provides. And if it should be objected that ratifying conventions would entail a good deal of expense, it might be replied that amending the fundamental law is a poor matter upon which to economize.

To this point, we have had to do only with the constitution as a document. But, as has been emphasized above, there is also a larger constitution which, in addition to the document, consists of principles, rules, interpretations, and practices, springing from

<sup>1</sup> The Gifford "lame duck" resolution providing for submission of an amendment changing the meeting time of Congress, passed by the House of Representatives by a vote of 289 to 93 on February 24, 1931, contained a clause under which the amendment was not to be submitted to the state legislatures until after at least one house of each legislature should have been chosen in a new election after the amendment resolution was passed by Congress. See p. 415 below.



statutes, executive orders, judicial decisions, and usage, and furnishing, in point of fact, a great and ever-expanding share of the constitutional law under which we govern ourselves. Here is the truly flexible part of our constitutional system; here is mainly where the constitution grows.

Statutory elaboration is very extensive and very important. The framers of the original constitution, being desirous of avoiding what one of them called "a too minutious wisdom," outlined distinctly enough the framework of the new government, but wisely left many details, both of organization and of functions, to be filled in by Congress, and even by the state legislatures. For example, they assumed the existence of executive departments, and twice referred in the constitution to the heads of such establishments, but left Congress not only to create the departments but to determine how many there should be, what they should be called, how they should be organized, and what should be their functions and interrelations. Other great administrative structures, standing outside of the executive departments, *e.g.*, the Interstate Commerce Commission and the Federal Trade Commission, have originated in the same way. The composition of the two houses of Congress was carefully prescribed, but the time, place, and manner of electing both senators and representatives were left to be fixed by the state legislatures, subject to control by Congress itself;<sup>1</sup> and in a comprehensive statute of 1842 on the election of representatives, and another of 1866 on the election of senators, Congress amplified the constitutional law of this subject in much detail. Again, the judicial power of the United States was vested in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."<sup>2</sup> Aside from the Supreme Court, therefore, the entire federal judicial establishment rests upon acts passed from time to time by Congress.

In short, a very large part of the actual working governmental system has been created, and may at any time be added to or otherwise changed, by ordinary legislative process. The French have a special term for statutes which, while forming no part of the constitutional laws (*i.e.*, the written constitution), are yet something more than ordinary statutes, in that they deal with the distribution and exercise of governmental powers. They call such measures "organic laws." We have no special name for them. But we rely

<sup>1</sup> Except that Congress might not regulate the places of electing senators.

<sup>2</sup> Art. III, § 1.

heavily upon them as a means of keeping the constitution abreast of the ever-changing conditions and requirements of political life. The truth is that whenever Congress passes a law, it in effect interprets the constitution. If the law touches some hitherto unsettled problem, or carries the power of the government into a new area, it not only interprets but adds. And while such creative acts may reach the Supreme Court for validation or disallowance, the great majority do not, leaving Congress the undisputed author of whatever new constitutional interpretations and devices may be involved. Decrees, orders, and other actions of the president, as chief executive, make similar contributions, as also do rulings by subordinate administrative authorities, including opinions rendered by the attorney-general.

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X

Still another, and probably the most important, mode of constitutional growth is judicial interpretation. How such interpretation comes about is not difficult to see. Congress, or a state legislature, passes a law, or a national or state official performs an act, which is challenged by some citizen or group of citizens affected adversely. A case is brought into the courts and the law or action is attacked as being unconstitutional; whereupon the judges must decide whether the charge is well based—in other words, whether the measure is or is not in accordance with constitutional provision. To do this, it is, of course, necessary to determine what the pertinent constitutional provisions mean; and this high task the courts boldly and habitually assume. The final arbiter is the Supreme Court. Whatever that august tribunal holds—even by a five to four majority—to be constitutional *is* constitutional and valid, regardless of what other authorities may think and of what consequences may be entailed for both private and public interests. “We are under the constitution,” remarked Chief Justice Hughes many years ago, “but the constitution is what the judges say it is.” There is, however, no necessary finality about a Supreme Court decision. Times change; justices die or resign; new presidents nominate new justices, who, being human, have their own particular points of view and, mayhap, their own political bias; and sometimes these new justices reverse the rulings of their predecessors, giving an opposite meaning to the constitution.<sup>1</sup> In 1870, the Court declared unconstitutional an act of Congress making paper cur-

Growth by  
judicial  
interpreta-  
tion

<sup>1</sup> When asked whether it would be possible in the United States to pass a tax law as radical as the Lloyd George budget of 1909, President Roosevelt replied: “It would depend upon whether a judge of the Supreme Court came down heads or tails.”

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rency legal tender for private debts; but the very next year, with somewhat changed personnel, it held the same procedure proper and valid. As mentioned above, a federal income tax was sustained in 1862, but overruled in 1895. Such changes of front are, of course, infrequent, yet numerous enough to forbid considering a constitutional question as necessarily settled for all time by what the Supreme Court says on it in a given case.

Judge-made law

It is hardly necessary to remark that this function of interpretation gives the courts, and especially the Supreme Court, tremendous power. In exercising it, the judges become the authors of a vast amount of case law, which to all intents and purposes forms a part of the constitution. Some jurists, it is true, hold that the courts do not make law. But they explain their position in labored language, and it is better to recognize frankly, with Mr. Justice Holmes, that judges "do and must legislate."<sup>1</sup> Furthermore, there is hardly any limit to the constitutional expansion and adaptation that may arise in this way. A disputed phrase of the constitution is interpreted in such a manner as to give it a content and application beyond that formerly attributed to it. This, in turn, furnishes a point of departure for a further elongation when the next case comes up. And so the process goes on, the lines of development, as a well-known writer has remarked, being "pricked out by one decision after another until the last has carried matters a long way from the point at which the interpreting process began."<sup>2</sup>

Illustrations

The main general problem upon which the interpreting activities of the courts have played in the last hundred and forty years is the powers of the national government; and it will forthwith give some idea of the extent of these activities to say that the whole body of implied powers of Congress, as distinguished from the modest list of eighteen powers enumerated in the eighth section of the first article, is traceable to this source. As emphasized above, it is not the formal constitutional amendments that have stretched the powers and functions of the national government to their present astonishing proportions, but rather legislation, usage, and especially judicial construction. Plenty of illustrations will come to light as our study proceeds. One only may be noted here. The constitution authorizes Congress to regulate commerce "with for-

<sup>1</sup> In dissenting opinion in *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917).

<sup>2</sup> W. B. Munro, *Government of the United States* (rev. ed.), 61.

eign nations and among the several states." Such regulation, however, could not be carried far before the question would arise, "What is commerce?" Inevitably, the definition of the term fell to the courts; indeed, the Supreme Court has been progressively defining the word for upwards of a hundred years, and the men who wrote and adopted the commerce clause would be surprised to know how far the definition has now been pushed beyond their simple conceptions. As early as 1824, the Court declared, in the case of *Gibbons v Ogden*,<sup>1</sup> that "commerce is undoubtedly traffic, but it is something more—it is intercourse;" and, by judicial interpretation, to regulate interstate commerce now means to control not only the transportation of goods by rail and water, but the carriage of passengers, the transmission of light and power, the moving of oil through pipe lines, and even the sending of ideas by telegraph, telephone, and wireless. Changing social and economic conditions and opinions have, furthermore, led the courts, in a series of lottery and pure-food-law cases, to concede to Congress the power to withdraw the privilege of interstate commerce altogether from articles the transportation of which is believed to conduce to immorality or to be liable to endanger the public health. In short, the power to regulate has been construed to involve the power to tax, and even to prohibit.<sup>2</sup>

"Time and habit," remarked Washington, "are at least as necessary to fix the true character of governments as of other human institutions;" and so it comes about that another mode by which our national constitution expands and develops is usage or custom. This method of change attracts less attention than the others; it does not—at all events immediately—result in amendments, laws, or judicial decisions. But all the time the working political system is being silently made over by it. An English scholar, Anson, has produced a substantial treatise entitled *Law and Custom of the [English] Constitution*, and another, Dicey, has given us an illuminating exposition of the part which "conventions" play in English constitutional organization and growth.<sup>3</sup> Extra-legal understandings, practices, and habits enter largely, however, into the workings of all governments—hardly less, in-

Growth  
by usage

<sup>1</sup> 19 Wheaton 1.

<sup>2</sup> F. J. Goodnow, "Judicial Interpretation of Constitutional Provisions," *Acad. Polit. Sci. Proceedings*, III, No. 2, pp. 1-16 (Jan., 1913); F. Frankfurter, "The United States Supreme Court Molding the Constitution," *Curr. Hist.*, XXXII, 235-240 (May, 1930).

<sup>3</sup> *Introduction to the Study of the Law of the Constitution* (8th ed., 1915).

deed, in America than in England itself—and it is interesting to note that a whole volume dealing with these developments in the government of the United States has come from the pen of an English observer.<sup>1</sup> Superimposed upon the instrument of 1787 and its formal amendments, upon the laws that amplify and the decisions that extend it, is a great and steadily developing “unwritten constitution,” whose rules and usages determine the actual workings of the governmental system quite as truly as do the stipulations of written law—in fact, sometimes more truly, considering that no small number of such usages have had the effect of turning written law into unexpected channels, or even of reducing it to a dead letter.

Illustrations:

1. The presidency

Illustrations come readily to mind. The constitution tells us that the president and vice-president are chosen by electors designated by the people, in accordance with a plan which we know to have been drawn deliberately to avoid direct popular election. Yet every schoolboy is aware that the electors really make no choice at all—that they merely register the decisions of the voters whom they represent—and that, therefore, except in meaningless form, the system is the reverse of that which the fathers intended. Similarly, the tradition—which amounts almost to a rule—limiting a president to two terms has no basis in the letter of the constitution, and runs counter to the intention of at least some of the framers. The cabinet, also, is unknown to the written fundamental law.

2. Congressional procedure

Congress no less strikingly shows the effect of established usage. The caucus system rests entirely upon this basis. The same is true of the committee system. The speakership of the lower house is, indeed, provided for in the constitution; but the weighty authority which the speakers gathered to themselves, and which to a considerable extent has survived the reforms of 1910-11,<sup>2</sup> is the product of usage. Notwithstanding the plain stipulation of the constitution that all bills for “raising revenue” shall originate in the House of Representatives, many such measures in effect start in the Senate.<sup>3</sup> On the other hand, the constitution does not say where appropriation bills shall originate, but as a matter of practice all of them are introduced first in the lower house. Custom alone prescribes that members of the House of Representatives shall be residents of the districts in which they are elected.

<sup>1</sup> H. W. Horwill, *The Usages of the American Constitution* (London, 1925).

<sup>2</sup> See p. 438 below.

<sup>3</sup> See p. 473 below.

Perhaps the most striking illustration of all is the development of party machinery. The makers of the constitution did not foresee the rise of continuous political parties of the sort with which we are familiar. Hence the instrument nowhere takes them into account, and until comparatively recently the statutes similarly ignored them. Nevertheless, parties quickly made their appearance, with the result that a vast mechanism—caucuses, conventions, committees, platforms, funds—grew up alongside the machinery of government provided for in the constitution, not only supplementing and enlarging it, but, as in the case of the election of the president, actually twisting it from its original character and purpose. Party activities are now regulated to some extent by statute, both national and state. But their very existence continues unknown to the national constitution, except perhaps as dimly envisaged in the Twelfth Amendment.

From across the Atlantic, the American scheme of government seemingly gives the impression of being a simple affair. A European scholar has been heard to remark: "Your system is beautifully clear and simple. A child can easily understand the clear-cut division of powers which your constitution has set up." And a leading English authority has spoken of commentators such as Kent and Story as having an easy task, for the reason that the theme of their writings is completely recorded in a single document (the national constitution) to which all the world has access. How wide of the mark are such conclusions must be evident enough to readers of the foregoing chapters; and further evidence will appear as we proceed. The bare outline of a governmental system contained in the written constitution as it came from the hands of the fathers, and as it can still be read in the books, has been amplified and filled in—by amendment, statute, interpretation, usage—until it has come to be one of the most elaborate and complicated plans of political organization and procedure known to history. Furthermore, the processes of change go ceaselessly on. The real constitution, as has recently been remarked, is a living body of rules carried into effect by living authorities. Woodrow Wilson, Mr. Justice Holmes, Elihu Root, and Herbert Hoover are its architects quite as truly as Hamilton, Madison, Franklin, and Morris. When the fundamental law no longer lives and grows, the nation which it has served will have become a memory.

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### 3. INSTRUMENTALITIES OF POPULAR CONTROL

## CHAPTER XI

### THE PEOPLE AS VOTERS

It is a proud boast of Americans that theirs is a country in which the people rule. What they mean is that the people set up their own governments, endow them with powers, fix the limits of their authority, elect their own officers, raise and settle their own issues, giving free vent to that somewhat elusive but real and important thing which we call public opinion. Any one who has some acquaintance with the nation's political history, and whose eyes are open to what goes on around him, knows, of course, that the "popular" basis of our governmental system is not to be taken too literally. He knows, for example, that the constitution was never submitted to a popular vote; that constitutional amendments are adopted or rejected by state legislatures whose members have been elected, as a rule, with no reference whatever to the changes proposed; that presidential candidates sometimes win with only a minority of the popular ballots; that rarely more than seventy per cent, and sometimes not more than fifty per cent, of the qualified electors go to the polls, even when a president is to be elected; that seniority rules, caucus proceedings, lobbyist activities, and legislative by-play with which the people have nothing directly to do largely determine the fate of measures in Congress in which great national interests are involved. He knows, in short, that if the people rule, they rule a good deal of the time at rather long range and by decidedly roundabout processes or means.<sup>1</sup>

Popular  
control  
and its  
limita-  
tions

Nevertheless, at bottom, the claim is justified. Ours is a government of the people, in the sense that the people are sovereign and have it in their power, both legally and actually, to make the government what they want it to be and cause it, at least eventually, to do what they want it to do. This is equally true whether we are thinking of the national government alone or of the governments

<sup>1</sup> C. A. Beard, "The Fiction of Majority Rule," *Atlantic Monthly*, CXL, 831-836 (Dec., 1927); J. Dickinson, "Democratic Realities and Democratic Dogma," *Amer. Polit. Sci. Rev.*, XXIV, 283-309 (May, 1930).



of the states and their political subdivisions as well; and we will be better equipped to study these different governments as going concerns if we first bring into view the agencies or channels through which popular control over them is exercised. This involves some consideration of (1) the composition and characteristics of the electorate, and (2) the organization of the electorate in political parties.

By the electorate we mean, of course, the people who are entitled to vote. In some countries, *e.g.*, France, this is a comparatively simple matter, being determined for the entire country, and for both national and local elections, by a single uniform national law. But in the United States it is rather complicated. Three main principles or procedures are found at work side by side. First, each state makes suffrage laws of its own, thereby in the main creating its own electorate. Second, two amendments to the national constitution (the Fifteenth and the Nineteenth) impose certain suffrage requirements on all of the states, to that extent giving the electorate a uniform nation-wide basis. Third, the electorate for national purposes is not a separate body of voters provided for by national law, but merely the aggregate, or sum total, of the state electorates resulting from the first two of these procedures.

The makers of the national constitution might easily have provided for a uniform national suffrage, distinct from the suffrage systems existing in the several states, as did the authors of the constitution of the federally organized German Empire created in 1867-71. But they chose, as did the framers of the constitution of the Swiss Confederation, to utilize for national purposes such electoral arrangements as each state had made, or might subsequently make, for its own use; and hence, until 1870, the constitution's sole provision on the subject was that persons voting for members of the lower house of Congress should, in each state, have "the qualifications requisite for electors of the most numerous branch of the state legislature."<sup>1</sup> The Fifteenth Amendment, adopted in the year mentioned, imposed the first direct constitutional restraint upon the states in this matter by forbidding any state (or the United States) to deny or abridge the "right" of citizens of the United States to vote "on account of race, color, or previous condition of servi-

<sup>1</sup> Art. I, § 2, cl. 1. It will be recalled that presidential electors were chosen in each state—as they still are—in such manner as the legislature prescribed, and that senators were elected by the state legislatures. The Seventeenth Amendment, in 1913, applied to senatorial elections the same suffrage arrangements that were employed in electing members of the lower house.

tude." The Nineteenth Amendment, adopted in 1920, laid a further restriction by forbidding any state (or the United States) to deny or abridge the "right" to vote "on account of sex." Limited only by these restraints, every state, in its constitution and laws, regulates suffrage qualifications as it desires. The two amendments tend to produce uniformity as far as they go; and their effects—especially in the case of the woman suffrage amendment—have been far-reaching. Plenty of room is left, however, for variation, and hardly any two states will be found with precisely the same arrangements.

From this it will be correctly inferred that the suffrage is regarded in this country as in the nature of a privilege rather than a right. It is a right for those people who have been endowed with it. But there is no inherent right to be so endowed. It is true that advocates of suffrage extension have always been prone to represent voting as a natural, if not a constitutional, right.<sup>1</sup> This argument was heard repeatedly during the long campaign for the enfranchisement of women. But political scientists are substantially agreed that who shall be permitted to vote and who shall not is a matter to be determined by considerations of expediency, and not on the theory that any particular class or classes of the people have an inherent right to be included; and the courts have repeatedly and unanimously held that the suffrage is not a right arising out of either national or state citizenship.<sup>2</sup> Nothing is more obvious than that there is, and can be, no necessary and fixed relation between citizenship and voting: children are citizens, but not voters; women are citizens, but until 1920 they were not voters in the majority of states. On the other hand, several states in times past allowed persons to vote who were not citizens.

The history of the suffrage, particularly in the older states, has been in the main a record of progressive extension of voting privileges to new groups of people—non-property-holders, small taxpayers, ex-slaves, women—although interspersed with extensions have been also contractions or restrictions arising from the application of new tests, such as that of literacy. As we have seen, the suffrage in the states in the period of the adoption of the national constitution was commonly confined to property-holders, with occa-

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The  
suffrage a  
privilege,  
not a right

The  
suffrage  
prior to  
1815

<sup>1</sup> W. J. Shepard, "The Theory of the Nature of the Suffrage," *Proceedings of Amer. Polit. Sci. Assoc.*, VII, 106-136 (1913).

<sup>2</sup> *United States v. Anthony*, Fed. Cases 14459; *Minor v. Happersett*, 21 Wallace 162. These decisions were rendered, in 1873 and 1874, in cases in which the question at issue was the right of women as *citizens* to vote.

sionally a religious test in addition.<sup>1</sup> As a result, only a minority—in some cases a very slender minority—of the adult male population could vote. Vermont, whose earliest constitution (1777) quaintly provided that every freeman might vote “who has a sufficient interest in the community,” was admitted in 1791 as a manhood suffrage state; Kentucky followed in 1792; and in the same year New Hampshire gave up her tax-paying requirements. On the other hand, Tennessee, Ohio, and Louisiana, although frontier states, entered the Union with property or tax qualifications; and in 1799 Kentucky gave indication of the looming race problem by disfranchising negroes, mulattoes, and Indians. Thus, prior to the War of 1812, the country as a whole showed no very decided drift in suffrage matters.<sup>2</sup>

Suffrage  
changes,  
1815-60

The period from 1815 to the Civil War, however, brought an impressive triumph of democratic principles. Appointive offices became elective. Qualifications for office-holding were liberalized. Above all, the suffrage was broadened. Conditions of life in the newer communities of the expanding West made political democracy inevitable there; and the older states were gradually led to the same policy by the growth of restless urban populations, by the hostility of merchants and manufacturers to freehold qualifications that they could not meet, by the effects of Jeffersonian political thought, and to some extent by the repercussions of western democracy itself. The upshot was that property qualifications were lowered and finally abandoned, tax-paying requirements were given up in all but a few states,<sup>3</sup> religious tests were abolished entirely, and in many states aliens were allowed to become voters as soon as they declared their intention to be naturalized. Woman suffrage was advocated here and there, although nowhere adopted at this time; and the benefits of the new laws rarely reached the free negroes. Furthermore, Connecticut in 1855 and Massachusetts in 1857 adopted reading and writing tests designed to disqualify illiterate immigrants. By 1860, nevertheless, most states had arrived at what may fairly be termed manhood suffrage for whites.

Since the Civil War, the suffrage has been broadened mainly by

<sup>1</sup> See p. 72 above.

<sup>2</sup> K. H. Porter, *History of Suffrage in the United States*, Chap. II.

<sup>3</sup> After Mississippi, admitted in 1817, no new state entered the Union with a property or tax-paying qualification. Property qualifications survived longest in Tennessee (to 1834), Rhode Island (to 1842), New Jersey (to 1844), Virginia (to 1850), and North Carolina (to 1856). Tax-paying qualifications still existed in 1860 in Massachusetts, Rhode Island, Pennsylvania, and North Carolina.

the enfranchisement of negroes, including the freedmen, and by the conferring of the ballot upon women. A few negroes voted in certain northern states before 1860. The general enfranchisement of people of color came, however, as a result of new constitutions and laws adopted during the Reconstruction era. The southern states were reluctant enough, and acted only as driven to it by the radical Republican majority in Congress. But voting privileges for the ex-slaves and their descendants, as indeed for negroes in every part of the country, were supposed to be guaranteed for all time by the Fifteenth Amendment.

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Enfranchisement  
of the  
negroes

Demand for the enfranchisement of women was heard as early as the Jacksonian era, and much was made of it in some quarters during the later stages of the Abolition movement. No legislature or constitutional convention, however, at this time gave serious attention to the petitions presented to it on the subject; as a rule, proposals of the sort met only ridicule. After the Civil War, the situation was different. The negro had been enfranchised; nearly all men were voters; and the advocates of votes for women could no longer be simply laughed out of court. The first notable triumph of the cause was in Wyoming, where in 1869 women were given the privilege of voting for territorial officers on the same terms as men.<sup>1</sup> On being admitted to the Union in 1890, this territory continued its woman suffrage arrangements, and before the close of the century Colorado, Idaho, and Utah also became equal suffrage states. The movement then slackened. But about 1906 it gathered fresh impetus, and in five years (1910-14) the number of equal suffrage states was raised to eleven.<sup>2</sup>

The move-  
ment for  
woman  
suffrage

Meanwhile the suffragists turned to the larger objective of a general nation-wide enfranchisement. To this end, some urged amendment of the national constitution so as to require a state to submit the question of woman suffrage to its electorate on petition of as few as eight per cent of the voters. Others, feeling that this "states' rights" method was too slow and uncertain, threw their support to the "Susan B. Anthony amendment" (first brought forward in 1869), which proposed to forbid the United States or

The  
Nineteenth  
Amend-  
ment

<sup>1</sup> Kentucky in 1838 and Kansas in 1861 began to permit women to vote in school elections. Other states gradually took similar action, and in 1887 Kansas conferred full municipal suffrage.

<sup>2</sup> In addition to the four states named, Washington (1910), California (1911), Arizona (1912), Kansas (1912), Oregon (1912), Montana (1914), and Nevada (1914). In Illinois (1913), women were given the right to vote at elections to all offices within the control of the legislature, including most local offices, a few state offices, and the office of presidential elector.

any state to withhold the ballot on account of sex. The movement finally centered upon the latter plan; and a brief period of sane but determined agitation brought complete success. The Nineteenth Amendment, embodying the Susan B. Anthony proposal, was adopted by Congress in 1919 and ratified by the requisite three-fourths of the states during the ensuing fourteen months. Proclaimed August 26, 1920, it had its first test at the national and state elections of the following November.

Female suffrage was advocated on many grounds. Most women are citizens. Many are property-owners, tax-payers, and managers of estates, and as such have the same interest in economical and efficient government that men have. Many have entered the professions and are doing work formerly done exclusively by men. Large numbers are wage-earners, with compensation, hours of work, protection against illness and accident, and provision for old age determined even more extensively by legislation and by the action of commissions and other administrative authorities than are the corresponding interests of men. It was argued, too, that voting privileges for women were a natural corollary of the new sex equality of these later days, and would soon be universal among civilized peoples.<sup>1</sup> Finally, it was contended not only that women ought theoretically to exert a purifying influence in politics, but that in those states and lands in which they possessed the ballot they had already done so. The principal counter-arguments were that woman's place is in the home, and that if she gives time and thought to politics her influence there will be proportionately diminished; that she can wield her greatest power for good socially, and even politically, by non-political means; that the bulk of women were already adequately represented through the votes of their husbands, fathers, and brothers; that the doubling of the electorate would

<sup>1</sup> As early as 1870, voting privileges were granted to women in municipal and other local elections in England and Wales, Finland, and Bohemia. New Zealand gave women the right to vote in parliamentary elections in 1893, and thereafter the movement won a long succession of triumphs in Australia, Canada, and South Africa. Norway gave women full parliamentary suffrage in 1913, Denmark in 1915, Holland in 1919; Great Britain, in 1918, enfranchised eight million women, *i.e.*, all over the age of thirty, and in 1928 added five million more by lowering the age limit to twenty-one. And the postwar constitutions of Germany (1919), Austria (1919), Czechoslovakia (1920), and other lands made woman suffrage the rule throughout central Europe. P. O. Ray, "The World-wide Woman Suffrage Movement," *Jour. Compar. Legis. and Internat. Law*, I, 220-233 (Oct., 1919); C. C. Catt, "Suffrage Only an Episode in Age-old Movement," *Curr. Hist.*, XXVII, 1-6 (Oct., 1927). By 1930, women had suffrage on equal terms with men in twenty-five countries considered sufficiently independent to be qualified to enter the League of Nations.

entail greatly increased campaign expenditures and electoral costs; that after novelty should have worn off, women would lose interest and would not go to the polls; and that they would be guided in voting, not by cool judgment, but by sentiment and emotion.

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The women of the entire country—or such of them as possess the necessary qualifications—have had the suffrage only eleven years. Furthermore, there are practically no statistics from which to learn how they vote. The results of three presidential and six congressional elections (besides multifold state and local elections) have, however, pretty clearly borne out the experience of those western states in which women have voted for a full generation. This experience is, in brief, that women voters are strikingly like men voters: some are vigilant and intelligent, many are apathetic and uninformed; some are independent, others are willing to take orders from the party manager or boss; many go to the polls voluntarily and with scrupulous regularity, many go only if pressure is applied or inducements offered, and many do not go at all. The proportions of the interested and the lethargic, of the well-informed and the ill-informed, do not appear to be very different in the two sexes. In short, while it would be impossible to show that woman's enfranchisement has had the bad effects that were predicted for it, it would also be difficult to prove that it has had definite beneficial results, except in particular localities. It is sound in principle and entirely correct as a matter of policy, but it has not worked, and must not be expected to work, a revolution.<sup>1</sup>

Results

At the same time, the political life of the nation has taken on some new and interesting features. Legislation in Congress has shown some effect, and women voters point to the Sheppard-Towner Maternity Act of 1921, the Cable Acts of 1922 and 1931 providing independent citizenship for married women, and other statutes as evidences of respect for their influence. Women have begun to be elected to high public offices, including two governorships (in Texas and Wyoming) in 1924. The number of women in the na-

<sup>1</sup> E. M. Sait, *American Parties and Elections*, Chap. III; S. A. Rice and M. W. Willey, "American Women's Ineffective Use of the Vote," *Curr. Hist.*, XX, 641-647 (July, 1924); C. C. Catt, "Woman Suffrage: the First Ten Years," *N. Y. Times Magazine*, Aug. 24, 1930; E. N. Blair, "Are Women a Failure in Politics?," *Harper's Mag.*, CLI, 513-522 (Oct., 1925); C. P. Gilman, "Women's Achievements Since the Franchise," *Curr. Hist.*, XXVII, 7-14 (Oct., 1927); D. A. Moncure, "Women in Political Life," *ibid.*, XXIX, 639-643 (Jan., 1929); A. S. Richardson, "Women in the Campaign," *Harper's Mag.*, No. 947, pp. 585-592 (Apr., 1929). N. M. Schoonmaker, "Where Does She Stand? Woman's Progress and Position in Politics," *Century Mag.*, CXIII, 354-360 (Jan., 1927), is an informing world-wide survey.

tional House of Representatives rose to nine at the close of the Seventy-first Congress (1931),<sup>1</sup> and for the first time a vigorous, though unsuccessful, effort was made to secure the appointment of a woman as a member of the president's cabinet.<sup>2</sup> The 1930 election brought a total of 147 women into state legislatures, in forty-three states in every section of the country. Above all, the country is covered with a network of non-partisan state and local leagues of women voters, linked up in an active and influential national organization—the National League of Women Voters—all concerned primarily with educating women to vote with intelligence and discrimination, and with securing remedial legislation and other reforms, national, state, and municipal. Naturally, the particular interests of women and children receive much emphasis; but the League's program is by no means confined to such matters. Unhappily, there is no comparable organization of men voters. A so-called National Woman's party, it may be added, is working for equal legal rights for women, to be attained in part by state legislation and constitutional amendments, but also in part by an ultimate "equal rights" amendment to the national constitution.<sup>3</sup> While not susceptible of exact statistical proof, it is agreed that women voted in unprecedented numbers in the presidential election of 1928 and contributed heavily to the outcome.

General  
suffrage  
qualifica-  
tions to-day

Looking over the electoral systems in the several states at the present time—under which upwards of forty per cent of the total population can qualify to vote, as compared with only six per cent during the Revolutionary period—one notes five main suffrage qualifications: age, residence, citizenship, payment of taxes, and education.<sup>4</sup> The age necessary for voting in most parts of the world is twenty-one, and this is the rule in every one of the American states. Citizenship is also a universal requisite in this country. The

<sup>1</sup> It fell, however, to six in the succeeding Congress.

<sup>2</sup> Already women were found in high administrative posts, not only in the states, but at Washington, where, in 1931, representatives of their sex were at the head of the women's bureau, the children's bureau, the bureau of home economics, the employees' compensation commission, and the passport division of the State Department. There were also women assistants to the attorney-general, vice-consuls, trade commissioners, collectors of customs, and commissioners of immigration. Equally significant was the steady increase of the number of women holding appointive or elective offices in counties, cities, and other local government areas. In 1929, there were, for example, 652 women office-holders (state and local) in Connecticut and 793 in Michigan.

<sup>3</sup> Though calling itself a "party," the organization does not put candidates in the field and is really non-partisan.

<sup>4</sup> Certain classes are everywhere debarred, *i.e.*, persons convicted of crime and inmates of asylums for the feeble-minded and insane.

commonest requirement concerning residence is that the voter shall have lived in the state at least one year. But some states, especially in the South, require two years; while others, *e.g.*, Michigan, Indiana, and Nebraska, require only six months, and Maine requires only three months. It is usual to prescribe, also, a brief period of residence in the county and the election district. Tax-paying, once a qualification widely maintained, survives as such in only one-third of the states. Arkansas and Tennessee require the voter to be able to show that he or she has paid a poll tax. Pennsylvania requires voters of the age of twenty-two and upwards to have paid a state or county tax within two years of the date of the election. Finally, most southern states utilize payment of taxes as one of the various qualifications designed to keep down the negro vote.

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In earlier times, educational, or "literacy," qualifications were uncommon. To-day, however, they are in use, in some form (*i.e.*, ability to read or both to read and write) in nineteen states, scattered over all parts of the country, and are authorized by constitutional provision in several others where the legislature has not yet seen fit to introduce them. Indeed, educational qualifications may be said, broadly, to have succeeded to the position once held by property qualifications, although they have the effect of excluding a decidedly smaller number of people. In some states, the only thing that is tested is ability to read; in others, it is ability to read understandingly and also to write. Of special interest is a system introduced in New York in pursuance of a constitutional amendment approved by the people in 1921, under which reading and writing tests for first voters—planned by a group of educational psychologists to approximate the attainments of a fifth-grade pupil in the public schools—are prepared and administered every year, not by registration or election officials, as in other states, but by the state educational department.<sup>1</sup> The electorate having now been expanded to its uttermost limits, the next step would seem to be to "trim it at the edges" by eliminating the least intelligent. Ascertainment that a citizen can read and write no more guarantees that he will always vote wisely than testing an applicant for an automobile

Educa-  
tional  
qualifica-  
tions

<sup>1</sup> Only those first voters are required actually to submit themselves to examination who cannot present as proof of literacy a certificate showing completion of the fifth grade in a school in which English is the language of instruction. For all purposes of the law, "literacy" means ability to read and write English. The introduction of the literacy test has greatly stimulated the interest of the foreign-born in evening-school instruction. Women are slower to submit themselves to the test than are men, but are more successful in passing it.



driver's license ensures that he will invariably manage his car with safety for himself and others. But it is as effective a means as we have of eliminating people who, by and large, are most likely to be unfit. And while at first glance the plan might seem undemocratic, and consequently out of harmony with American principles, the fact that all of the states now make it possible for every man and woman, even of low intelligence, to receive an elementary education without cost—in evening schools, if in no other way—relieves it from any such opprobrium. The road to the ballot-box should lead through the school-house.<sup>1</sup>

Half of the states that have literacy tests are in the South, and in that section these restrictions, along with others, are adroitly used for a very special purpose, *i.e.*, to debar negroes from voting. The endowment of the freedmen with the suffrage at the close of the Civil War produced extraordinary and lamentable results. Led by conscienceless carpetbaggers from the North, and aided by the temporary disfranchisement of white men who had been active in the Confederate cause, the inexperienced and gullible negroes got possession of state legislatures, passed fantastic and unjust laws, spent money like water on foolish projects, granted questionable franchises, and in other ways showed their lack of preparation for the exercise of political power. By one means or another, the whites gradually recovered control; and, convinced that their security and prosperity depended absolutely upon keeping the upper hand, they naturally bent all effort toward preventing the negroes—now endowed with the suffrage, and in many sections outnumbering the whites as much as four to one—from again capturing the state and local governments. To this end, it was necessary, of course, to see that the Fifteenth Amendment did not have its full intended effect; and for fifteen or twenty years, devices were employed and practices indulged in that were extra-legal, and often clearly illegal. Ku-Klux demonstrations, arbitrary arrests on the

<sup>1</sup> F. G. Crawford, "The New York State Literacy Test," *Amer. Polit. Sci. Rev.*, XVII, 260-263 (May, 1923), and XIX, 788-790 (Nov., 1925); A. W. Bromage, "Literacy and the Electorate," *ibid.*, XXIV, 946-962 (Nov., 1930); W. B. Munro, "Intelligence Tests for Voters," *Forum*, LXXX, 823-830 (Dec., 1928). Variations of definition are responsible for widely differing estimates of the total number of illiterates in the United States. Counting only persons who confessed inability to write in any language, the census-takers of 1920 found almost five million. Counting persons unable to read and write English, the Illiteracy Commission of the National Education Association reported in 1924 ten million illiterates and an equal number of "semi-illiterates." On the general subject, see S. R. Winston, *Illiteracy in the United States and its Social Significance* (Durham, N. C., 1930).

eve of elections, theft of ballot-boxes, repeating, false counting of votes, and other forms of intimidation and corruption became exceedingly common, and were generally condoned by the authorities, including the courts.

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About 1890, southern people began to feel that the negro's disfranchisement ought to be regularized by legal, and even constitutional, provisions. It would, of course, be contrary to the Fifteenth Amendment to deny the ballot to negroes as such. But by imposing educational or tax-paying tests, carefully devised to catch the negro without debarring any considerable number of white people, the essential object could still be attained. And the history of the suffrage in the South during the past forty years has been mainly a story of the adoption and administration of discriminatory regulations of this character. In Mississippi—the first state to incorporate clauses for this purpose in its constitution (1890)—the voter must have paid all taxes assessed against him, including a poll tax of two dollars, and must be able either to read any section of the state constitution or to understand it when read to him and to give a reasonable interpretation thereof.<sup>1</sup> The uneducated negro, being proverbially careless, is more than likely to be unable to produce his tax receipt; on the other hand, the registration officers are prone to “forget” to ask the white voter to produce one. Comparatively few Mississippi negroes, furthermore, can read; still fewer can give an interpretation of the state constitution that will be accepted as “reasonable” by white officials with a strong predisposition against negro voting. If, furthermore, in replying to detailed personal questions which are put to him the candidate for registration deviates by a jot from the truth, he becomes guilty of perjury, for which he may be disfranchised. Here again the authorities may apply wholly different standards according to the color of the applicant.<sup>2</sup>

Tests intended to disfranchise the negroes

The Mississippi plan has served more or less as a model for other states. It proved, however, to have one drawback. Notwithstanding judicious administration, it did not sufficiently protect the illiterate white; and in certain states this defect was partially remedied by so-called “grandfather clauses.” South Carolina, in 1895, excused for three years from the regular educational test all

“Grandfather clauses”

<sup>1</sup> The requirement of residence, also, has been raised to two years in the state and one year in the election district.

<sup>2</sup> T. F. Jones, “Powers of the Southern Election Registrar,” *Outlook*, LXXXVII, 529-531 (Nov. 9, 1907); W. F. White, “Election by Terror in Florida,” *New Republic*, XXV, 195-197 (Jan. 12, 1921).

men, otherwise qualified, who were voters, or whose progenitors were voters, in 1867. The object was frankly to enable the illiterate whites to get their names permanently on the roll of voters, while keeping the negroes from doing so. The Louisiana constitution of 1898, after requiring voters to be able to read and write, or in lieu of that to be the owners of property valued at not less than \$300, went on to exempt from both of these qualifications any person who was himself, or whose father or grandfather was, on January 1, 1867, or on any prior date, a voter anywhere in the United States. The benefit of this exemption fell, and was intended to fall, almost exclusively to the illiterate and poor whites.

Their  
effective-  
ness

At one time or another, all of the states of the "Solid South" brought devices of this sort into play, with the thinly-disguised purpose of making it difficult or impossible for the negro to take part in politics and government. The plan was, not to bar people of color by direct prohibitions, but rather to set up unusual qualifications which could be so interpreted and administered as to reduce negro voting to a minimum; and how successful it has been is indicated by the belief of competent observers that in some states not one adult negro in a hundred ever casts a ballot, and that, throughout the South as a whole, probably less than ten per cent of the adult negro population is on the registration lists. Having served their purpose, the grandfather clauses have disappeared; such a feature of the Oklahoma constitution of 1907 was, indeed, declared void by the Supreme Court in 1915,<sup>1</sup> and no clause of the kind is now in force.

Exclusion  
of negroes  
from  
Democratic  
primaries

The desire to keep the ballot in the hands of the whites is, nevertheless, as keen as before, and of late some interesting new ways of securing this end have been devised. In most southern states, the Democratic party is so securely in control that nomination at a Democratic primary is equivalent to election. Accordingly, all purposes will be served if negroes are kept from participating in the primaries, and as many as eight states have enacted laws with this object definitely in view. Seven of these states made no attempt to go beyond giving the state central committee of each party the power to prescribe qualifications for voting in addition to those laid down in the constitution and the statutes<sup>2</sup>—on the assumption that the qualifications so prescribed will, in the case of the majority

<sup>1</sup> *Guinn v. United States*, 238 U. S. 347 (1915).

<sup>2</sup> It should be noted that two states outside of the South, *i.e.*, Delaware and Idaho, have also done this.

party, be found to be possessed only by white Democrats. Texas, however, went farther by writing into her law a provision that "in no event shall a negro be eligible to participate in a Democratic primary election held in the state of Texas, and should a negro vote in a Democratic primary election such ballot shall be void and election officials are herein directed to throw out such ballot, and not count the same." Naturally, this bold provision was challenged; and although a United States district court, citing the decision in *United States v. Newberry*,<sup>1</sup> held the stipulation valid as within the police power of the state, the Supreme Court, in 1927, held it unconstitutional as being in conflict with the clause of the Fourteenth Amendment which guarantees the equal protection of the laws.<sup>2</sup> Not to be frustrated, however, the Texas legislature, which happened to be in session when this decision was announced, forthwith passed a new "white primary" law giving every political party in the state, through its state executive committee, the power to "prescribe the qualifications of its own members," and thus to determine "who shall be qualified to vote or otherwise participate in such political party." In pursuance of this authority, the Democratic state executive committee promptly proceeded to debar negroes, and the ban has been upheld by several United States district courts. In Louisiana, a similar procedure has been sustained by the supreme court on the ground that the legislature has not undertaken to fix any political qualifications of voters at a primary, but has "wisely left the matter to the state central committee of the several parties . . . where it originally resided and naturally belongs."<sup>3</sup> The new Texas law, like the others, is clearly a subterfuge, and whether it, or any of similar nature, would be sustained by the federal Supreme Court, if tested before that tribunal, is—to say the least—doubtful.<sup>4</sup>

<sup>1</sup> See p. 409, note 2, below.

<sup>2</sup> *Nixon v. Herndon*, 273 U. S. 536. The Fourteenth Amendment, the Court said, offered so simple and obvious a basis for a decision that there was no need of considering the bearing of the Fifteenth Amendment upon the case. After the decision was announced, lawyers differed on the question of whether the court had overruled its definition of primaries in the *Newberry* decision, with the effect of giving the national government power to regulate state primaries. The best opinion was, however, that if the court had intended to overrule the *Newberry* definition and hold a primary to be an election, the Fifteenth Amendment, rather than the Fourteenth, would have been invoked in setting the law aside.

<sup>3</sup> *State v. Michel*, 121 La. 393.

<sup>4</sup> J. E. Pate, "The Texas White Primary Law," *Nat. Mun. Rev.*, XVI, 617-619 (Oct., 1927); R. W. MacDonald, "Negro Voters in Democratic Primaries," *Texas Law Rev.*, V, 393-400 (June, 1927); J. W. Johnson and H. J. Seligman, "Legal Aspects of the Negro Problem," *Annals Amer. Acad.*,

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XIMerits  
of the  
southern  
procedure

All this arouses, in these days, only sporadic protest. Southern whites regard the policy as natural and inevitable. The disfranchised negroes are, as a rule, indifferent. Even in the North, there is no strong disapprobation; in 1912, the Republican party significantly stopped putting in its platform the time-honored denunciations of the southern laws and practices on the subject. The restrictive regulations—particularly as administered by registration and election officials—are no doubt objectionable, in that they set up discriminations which are really based on considerations of race, and also in that they are deliberate evasions of the fundamental law of the country. Most southern negroes, however, are poorly qualified for political power; many of them manifest no desire to vote; some of their leaders consider that the race will gain more in the long run by accepting white control; and the heavily outnumbered white populations (in several of the states) must be conceded to have the logic of cold facts largely on their side. The initial mistake was made when the freedmen were enfranchised *en masse* some sixty years ago.<sup>1</sup>

Penalty for  
disfranchisement  
not enforced

With a view to penalizing states which restrict the suffrage, the Fourteenth Amendment provides that if a state denies or abridges the right of any of its male inhabitants, being twenty-one years of age and citizens of the United States, to vote, "except for participation in rebellion, or other crime," the basis of representation in such state shall be reduced in the proportion which the number of unenfranchised male citizens bears to the whole number of male citizens twenty-one years of age in the state. Attempt has been made to show that this penalty was intended to apply only in cases of denial of the suffrage on account of race or color.<sup>2</sup> But the phraseology of the amendment admits of no such interpretation: Massachusetts is quite as liable to a reduction of its quota of representatives in Congress because of its general educational qualifi-

*Polit. and Soc. Sci.*, CXL, 90-97 (Nov., 1928). The Texas law was given a new turn in 1930 by efforts to bar from the primaries of that year persons who bolted the Smith ticket in the presidential election of 1928. In June, 1930, the U. S. circuit court of appeals at Richmond, Va. (in the case of James O. West v. A. C. Bliley, William Boltz, and William Richer) held that the Virginia primary law—construed and administered so as to permit Democratic party authorities to exclude negroes from primaries—was in violation of the Fourteenth and Fifteenth Amendments, *N. Y. Times*, June 6, 1930.

<sup>1</sup> E. M. Sait, *American Parties and Elections*, Chap. II; J. C. Rose, "Negro Suffrage; the Constitutional Point of View," *Amer. Polit. Sci. Rev.*, I, 17-43 (Nov., 1906); A. H. Stone, *Studies in the American Race Problem* (New York, 1908).

<sup>2</sup> E. G. Murphy, "Shall the Fourteenth Amendment be Enforced?," *No. Amer. Rev.*, CLXXX, 109-133 (Jan., 1905).

cations as is Louisiana on account of its restrictions aimed at the negro. In point of fact, this provision has never been carried out. The average number of voters in the South who elect a representative to Congress is very much smaller than the average number in the North, and loud complaint has long been made, mainly by northern Republicans. Enforcement of the constitutional penalty would, however, raise embarrassing questions and have weighty political repercussions. Consequently, although numerous bills on the subject have appeared in Congress, all have fallen by the wayside at one stage or another.

Such are the complex and devious lines on which our country determines who shall have the political power that goes with voting. What is there for the electorate as thus defined to do? In the states, there is much variation. In every case, a new constitution or constitutional amendment must be submitted to a popular vote.<sup>1</sup> In twenty states, the voters pass upon ordinary laws referred to them by the legislature, and in eighteen they also may initiate measures. In all instances, they elect the members of both houses of the legislature, the governor and varying numbers of other state officials (including many judges), and widely differing—but usually extensive—lists of county, city, town, and other local officers and boards. By discussion, information, criticism, and other more or less indirect means, they help the policy-framing authorities discover the public will and carry it out. In the domain of the national government, their tasks are fewer. They agitate for or oppose constitutional amendments, but they do not vote upon them.<sup>2</sup> There is no national initiative or referendum for ordinary laws.<sup>3</sup> Aside from formulating and expressing opinion, the voters, indeed, merely elect officers. And the number that they elect is not large, *i.e.*, only the president and vice-president and the members of Congress. No administrative subordinates, and no members of the judiciary, are elective. Any given elector, therefore, votes only for (a) a set of presidential electors in his state—virtually, of course, for president and vice-president, (b) the two senators of his state, (c) a representative of his district in the House of Representatives, together with one or more congressmen-at-large if his state is entitled

The  
electorate's  
tasks

<sup>1</sup> Except constitutional amendments in Delaware.

<sup>2</sup> See p. 172 above for proposals to apply the initiative and referendum to amendments.

<sup>3</sup> An international agreement for popular referenda on declarations of war, except in cases of actual or threatened attack, was called for in the Democratic platform of 1924; also an "advisory" referendum on the question of whether the United States should become a member of the League of Nations.

to such.<sup>1</sup> So far as the national government is concerned, therefore, we have—and have had from the beginning—a “short ballot,” whatever must be said to the contrary for the state and local governments.

How actively do those of our people to whom it falls, as voters, to supply the popular control which our system of government contemplates accept the responsibilities involved? Thereby hangs a somewhat dismal tale. The census of 1920 showed the total population of the continental United States to be 105,710,620. Of this great body of people, somewhat more than fifty-four millions were citizens twenty-one years of age or over. Of this latter number, many (no one knows precisely how many) were, of course, ineligible to vote, because of inability to meet the qualifications imposed in their respective states. When, however, it is noted that in the presidential election of the year indicated only a little over twenty-six and one-half million men and women voted for any candidate for the highest office in the land, we come upon one of the most surprising, and many people think one of the most discreditable, aspects of our political life. Many of the non-voters had failed to register; many who registered neglected to go to the polls; many who went to the polls voted only for certain offices and not for all. Prior to 1928, the proportion of citizens of voting age who actually voted (as indicated by the quadrennial vote for president) declined for thirty years. In 1896, it was 80.75 per cent; in 1900, 76.39 per cent; in 1904, 68 per cent; in 1908, 68.93 per cent; in 1912, 61.95 per cent; in 1916, 65.1 per cent; and in 1920, 52.35 per cent. In 1924—withstanding unusual effort to “get out the vote”—the proportion was almost exactly the same as four years previously. These later figures compared very unfavorably with the showing in many other countries—for example, in Great Britain, where parliamentary (although not local) elections usually bring out from seventy to eighty per cent of the potential voters, and in Germany, where, since 1918, the proportion has once or twice risen beyond eighty-five per cent. The exceptionally spirited Hoover-Smith campaign of 1928 yielded a popular vote for president of over thirty-six and one-half millions, out of a total electoral registration of slightly more than forty-three millions. This was a good showing, so far as the people not only qualified but actually registered were concerned. But large numbers (again, no one knows how many) of potential voters failed to register; besides, the circumstances were

<sup>1</sup> See p. 409 below.

so unusual that it would not be safe to assume that the electoral cause has taken a definite and permanent turn upward.<sup>1</sup>

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Causes

The reasons for our numerical deficiency as voters are many. A quarter of a million men and women are non-voters because of having no legal residence outside of the District of Columbia. Large numbers at every election, especially in the cities, are debarred because of not having resided long enough in the state or election district. Ten or more southern states, to all intents and purposes, have but one party, and because of the lack of real contests, together with the virtual disfranchisement of the negroes, yield an exceedingly small vote: in South Carolina in 1924, only about six per cent of the voters exercised their right of suffrage, and in Georgia and Mississippi only about twelve per cent.<sup>2</sup> Many voters in all parts of the country are prevented from casting their ballots by bad weather, illness, or other legitimate reasons; although it should be noted that the enactment of absent-voting laws in all states except two has largely removed one great obstacle of earlier days, *i.e.*, absence from the voting precinct.<sup>3</sup> To some extent, voters are discouraged or thwarted by legal and administrative obstacles. To some extent, they are deterred by timidity, by disgust with politics, by dislike of woman suffrage, or even by opposition to political action generally. After all allowances are made, however, one is tempted to surmise that the most common cause is no one of these things, but simple indifference and inertia; and an extensive first-hand study of non-voting in the city of Chicago, carried to completion in 1924, bears out this opinion.<sup>4</sup> Sometimes there is indifference toward a particular election only. But more often it extends to elections generally; and the Chicago investigation shows it specially prevalent among younger voters, in poorer neighborhoods, and among housewives, but only slightly more so among people of foreign than among those of native birth.

Whatever the reasons, the stay-at-home vote has attained such

Remedies

<sup>1</sup> The most trustworthy computations for the period 1856-1920 will be found in A. M. Schlesinger and E. M. Erickson, "The Vanishing Voter," *New Republic*, XL, 162-167 (Oct. 15, 1924). Figures differing appreciably from those given in this article will be found in many places, but are likely to be erroneous because of insufficient allowance for ineligibles.

<sup>2</sup> G. W. Johnson, "The Dead Vote in the South," *Scribner's Mag.*, LXXVIII, 38-44 (July, 1925).

<sup>3</sup> P. O. Ray, *Political Parties and Practical Politics* (3rd ed.), 280-287; "Absent-voting Laws," *Amer. Polit. Sci. Rev.*, XVIII, 321-325 (May, 1924); "Absent-voting Legislation, 1924-1925," *ibid.*, XX, 347-349 (May, 1926).

<sup>4</sup> C. E. Merriam and H. F. Gosnell, *Non-Voting; Causes and Methods of Control* (Chicago, 1924), Chap. VII.



proportions as to have attracted a great deal of attention; every important election brings a fresh round of remorseful and hortatory discussion of the subject. Two main considerations, however, are always to be borne in mind. The first is that, contrary to very general assumption, there is no particular virtue in mere numbers of votes. Most get-out-the-vote efforts begin and end in the attempt to induce men and women to go to the polls, regardless of whether they know anything about the issues or the candidates. The thing to be aimed at is not simply voting, but intelligent and interested voting; and energy spent upon getting ballots into the hands either of persons who are insufficiently informed to make intelligent decisions or of persons who are informed but have no clear opinions is misdirected. The second consideration is that the solution for the problem lies, not in dragging unwilling electors to the polls, but in gradually improving the electoral system and raising the tone of political life. "What we most need," writes one of the keenest students of the subject, "is to make registration less of an irksome task, the ballot simpler (with provision for the representation of minorities), elections less frequent, the issues clearer, party cleavages more distinct and vital, the party programs less evasive, and, above all, to organize our campaigns of civic education so that they will be more comprehensive, more persistent, and more effective in reaching those sections of the electorate which have enough intelligence to understand what it is all about."<sup>1</sup>

Proposal  
of com-  
pulsory  
voting

A more direct and immediate solution has often been suggested, in the form of legislation making voting compulsory. Several foreign countries—Belgium, Denmark, Holland, Czechoslovakia, Argentina, etc.—have experimented more or less successfully with this device, and the constitutions of two of our states, *i.e.*, Massachusetts and North Dakota, authorize laws on the subject whenever the legislature sees fit to enact them. The scheme, however, offers many practical difficulties, *e.g.*, that of affixing appropriate and easily administered penalties. Moreover, the plan of drafting voters for an election runs counter to the ideal of personal liberty—to say nothing of the consideration that voting is worth while only when interested and intelligent—and the American mind is not likely to be won over to it.

<sup>1</sup> W. B. Munro, "Is the Slacker Vote a Menace?," *Nat. Munic. Rev.*, XVII, 86 (Feb., 1928). Cf. H. F. Gosnell, "Motives for Voting as Shown by the Cincinnati P. R. Election of 1929," *ibid.*, XIX, 471-476 (July, 1930); C. Eagleton, "A Defense of the Non-Voter," *South Atlantic Quar.*, XXVII, 341-354 (Oct., 1928).

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## CHAPTER XII

### POLITICAL PARTIES

Why  
parties  
exist

In their capacity as voters, the people of the United States function most conspicuously and effectively when organized in more or less permanent associations known as political parties. It would be too much to expect that voters should always, or indeed ever, entirely agree upon who should be put in the public offices, or upon what the government should be and do. What happens is that those who think alike in such matters come together in some sort of an organization, whose broad purpose may be to attract support for a body of political doctrine, but whose immediate end is pretty certain to be to secure control of the government through the winning of elections and the holding of public office. Control of the government means "the power to make and administer law, to levy, collect, and expend public revenues, to undertake and carry on public works, to hold the stewardship of public property, to grant public franchises, to fill public offices, to distribute public employments—to be, in fact, for a given term, *the public* of cities, of states, and of the great nation, in all the handling of their stupendous corporate affairs."<sup>1</sup>

Uses of  
parties

Although their history contains many sordid and selfish chapters, political parties are powerful forces for good in a democracy: they educate and organize public opinion by keeping the people informed on public matters, by discussing public questions in the presence of the people, and by securing not only discussion before the people, but (what is quite as important) discussion by the people. In our own country, and in most other democratically governed countries, political parties have become so indispensable that it is hard to conceive of any possibility of getting along without them. They constitute the most important channel through which the ordinary citizen can exert a direct influence in the formulation of public policy and the execution of that policy when enacted into law; he finds almost his only point of direct and vital contact with his

<sup>1</sup> J. N. Larned, "A Criticism of Two-Party Politics," *Atlantic Monthly*, CVII, 291 (Mar., 1911).

government when, at the ballot box on primary and election days, he votes for the candidates of one party or another for state and national offices. Parties perform their highest and most legitimate function when they serve as agencies for the application of political, social, economic, and moral principles to the life of the people. Without organized political action, there can be little real improvement of social conditions and few vital changes in government itself. Owing to the constitutional separation of the executive and legislative departments of our national and state governments, abundant opportunities are afforded for friction, and even prolonged deadlocks, in the enactment of laws. This is especially likely to occur when the executive belongs to one political party and the majority in one or both branches of the law-making body are of another party. When, on the other hand, the executive and a majority of the lawmakers belong to the same party, the influence of party fellowship and common aims partially eliminates grounds of discord and tends to promote effective coöperation between branches of the government which both national and state constitutions make legally independent of one another.

Any one, therefore, who desires something more than merely a superficial knowledge of the American system of government must study two sets of political institutions. One of these may conveniently be described as the machinery of government; the other, as the party system. The first includes the formal organization or structure of our national, state, and local governments, with their executive, legislative, and judicial branches. These formal governmental institutions are outlined more or less fully in the national and state constitutions, in municipal charters, and in the national and state statutes which amplify constitutional provisions. But a study which is restricted to such documents will leave one quite uninformed on the real nature and actual workings of government in the United States; for the effect of many constitutional and statutory provisions, in actual operation, has been widely different from that originally intended. In many cases, these developments are to be explained by the customs or unwritten law of political parties in operating the machinery of government—a fact which will be amply illustrated in our study of the presidency and of Congress.<sup>1</sup> Constitutional documents and statutory enactments create an inert piece of governmental machinery; the motive power for running this machinery and the lubricant which keeps its

Two sets of  
political  
institutions

<sup>1</sup> See Chaps. xv-xvi, xxi-xxii below.

different parts operating with a fair degree of smoothness are furnished by political parties. Despite their fundamental importance, however, not a word is said about parties in the national constitution, and very little in state constitutions. The truth is that they have developed to maturity in the United States outside of the constitutional system, and also largely as extra-legal institutions.<sup>1</sup> In these respects, American parties differ sharply from parties in Great Britain—the latter being essential parts of the country's constitutional machinery, functioning within the government and not from the outside.<sup>2</sup>

The two-  
party  
system

However the party affiliations of individual citizens may be determined—whether by careful study and deliberate decisions or by inheritance or environment—the mass of American voters have supported one or the other of two great parties that have occupied the center of the political stage throughout most of the period since the adoption of the constitution. This two-party system, as it is called, is a distinguishing characteristic of the politics of the United States, and also of all English-speaking countries; and it is found practically nowhere else. Here in the United States we began our history under the constitution with the Federalist and Jeffersonian Republican parties; then followed a period in which most voters found themselves in either the Whig or the Democratic party; and since the Civil War the great majority of voters have called themselves Democrats or Republicans.

Minor  
parties

From the first quarter of the nineteenth century, however, there have been many voters, in the aggregate, who for one reason or another have been dissatisfied with the principles, policies, or leadership of the two major parties for the time being, and who have accordingly started independent, or "third-party," movements. First among these organizations came the Anti-Masonic party in 1826 and the years immediately following; then the Liberty party, which appeared about 1840; followed by the Free Soil party, in 1848; the Native-American, or Know Nothing, party, in the early fifties; the Republican party, which was at first a minor third party, in 1854-56; the Prohibition party, in 1872; the Greenback party, in 1876; the Populist party, about 1890; and the Socialist party, about 1897. These and several other minor parties have served a very useful purpose, and at times one or another of them

<sup>1</sup> Nearly a century and a quarter elapsed before Congress, in 1907, passed the first law regulating party activities; and for about a hundred years there was very little state legislation on the subject.

<sup>2</sup> A. L. Lowell, *The Government of England*, I, Chap. xxiv.

has polled enough votes in pivotal states to change the result of a presidential election.<sup>1</sup>

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XII

Periods  
of party  
history:

Before the adoption of the constitution there were no political parties in the sense in which that term is now generally understood; as durable and disciplined organizations, parties first appeared in the later portion of Washington's first administration. Their history from that day to this may conveniently be divided into half a dozen fairly distinct periods, namely, (1) Federalist supremacy (1789-1800); (2) Jeffersonian Republican supremacy (1801-1816); (3) "personal politics" (1816-1832); (4) Democratic and Whig rivalry (1832-1860); (5) Republican supremacy (1861-1884); and (6) Democratic and Republican rivalry, since 1884.<sup>2</sup>

The principal issues between the Federalists and the Jeffersonian Republicans arose out of (1) attitudes toward government and individual liberty; (2) questions of foreign policy; (3) differences of social and economic interest; and (4) questions of constitutional construction.

1. Fed-  
eralist  
supremacy  
(1789-  
1800)

The Federalists, either by nature or from economic motives, believed in a strong government—one not merely adequate for the protection of life and property, but able to serve as an important agency for the promotion of economic prosperity. To their opponents, on the other hand, all governments were a necessary evil, to be curbed at every possible point in the interest of individual liberty; and the national government, in particular, they felt should be restricted in its operation to the narrowest possible sphere compatible with the general welfare.<sup>3</sup>

Issues:  
(a) Liberty  
and gov-  
ernment

In the second place, the Federalists and Jeffersonians were sharply divided over the question of what should be the official attitude of our government toward the principal nations engaged in the wars arising out of the French Revolution. The Federalists, closely bound to England by commercial ties and feeling scant sympathy for the democratic movement in France, naturally fa-

(b) Ques-  
tions of  
foreign  
policy

<sup>1</sup> The political history of New York affords several examples. In 1844, the Liberty party's vote in that state was sufficient to throw the state's electoral vote to James K. Polk, the Democratic candidate, and so to ensure his election over the Whig candidate, Henry Clay; in 1848, the Free Soil party drew away so many votes from Cass, the Democratic nominee, that the Whig candidate, General Taylor, carried the state; and in 1884, the Republicans held the Prohibitionists responsible for the loss of the state and the consequent election of Grover Cleveland.

<sup>2</sup> These dates must not be taken as rigidly marking the limits of the periods mentioned, for each period shaded off gradually into the succeeding period.

<sup>3</sup> C. E. Merriam, "The Political Theory of Thomas Jefferson," *Polit. Sci. Quar.*, XVII, 24-45 (Mar., 1902), and *History of American Political Theories*, Chap. iv.

vored an alliance with England—at least a policy of neutrality. The Republicans, instinctively sympathizing with the movement which had overthrown the French monarchy, and gratefully remembering the help rendered by France to our cause during the American Revolution, favored alliance with the French. It is difficult to realize to-day how deeply this line of division cut into the early history of our national politics.

(c) Con-  
flicting  
economic  
and social  
interests

The rivalry of the Federalists and early Republicans also reflected the clash of economic interests and different social standards.<sup>1</sup> The strength of the Federalist party lay in the more populous sections of the North and East, especially the centers where trade and commerce flourished; although not a few of the large-scale tobacco planters in Virginia and rice planters in South Carolina should also be counted in. Identified with that party, one was pretty certain to find the more aristocratic elements, the commercial classes, and such capitalistic groups as existed. These were the people who had been chiefly instrumental in bringing about the adoption of the new constitution, and who cordially approved the fiscal policies of Alexander Hamilton. The Jeffersonian party, on the other hand, recruited its strength in part from the small tradesmen and mechanics in the towns along the coast, but mainly from the more sparsely settled and frontier sections, especially in the South and West, where agriculture rather than trade was the dominant economic interest.<sup>2</sup> Here, love of individual liberty was strongest; here, the expansion of the powers of the national government was viewed with alarm; here, class distinctions were drawn less sharply than in the North and East, and social conditions more nearly approached democratic ideals.

(d) Consti-  
tutional  
interpre-  
tation

Over important questions of constitutional interpretation, also, the Federalists and early Republicans were sharply divided at first. The Federalists favored a liberal—their opponents said a loose—construction of the constitution; in all cases of doubt as to whether the national government had power to act, the Federalists attributed the disputed power to that government. They believed in permitting the national government to exercise, not only the powers expressly granted in the constitution, but also all powers that might fairly be implied from those expressly granted, in this way impart-

<sup>1</sup> C. A. Beard, *Economic Origins of Jeffersonian Democracy* (New York, 1915), Chaps. I, VI, VII, XII, XIV; *idem*, "Some Economic Origins of the Jeffersonian Democracy," *Amer. Hist. Rev.*, XIX, 282-298 (Jan., 1914).

<sup>2</sup> C. A. Beard, *Economic Interpretation of the Constitution of the United States*, Chaps. V, X, XI.

ing validity to measures of dubious constitutionality but of far-reaching importance to the commercial interests that found a champion in Hamilton. To Jefferson and his followers, on the other hand, these canons of constitutional construction seemed fraught with grave danger to individual liberty, and objectionable also in that they sanctioned policies which seemed seriously in conflict with the economic interests of the less substantial classes in the country. The Jeffersonians therefore advocated a strict—their opponents said a narrow—interpretation of the powers of the national government, such that the government would have been limited to those means which were absolutely indispensable, not merely convenient and not prohibited, for carrying out expressly granted powers; and all cases of doubtful sanction were to be resolved against the national government.<sup>1</sup>

This difference between the earliest of our great parties over questions of constitutional construction has been regarded by many as of fundamental importance; and at times it has appeared to work at least a theoretical cleavage between the dominant parties of later periods. Nevertheless, it soon lost all real significance as a working guide to action in practical politics; for, as we have seen, when the Jeffersonian Republicans came into power in 1801, they found it expedient tacitly to accept and to act upon the liberal constitutional views of their opponents; and in later periods, when important measures were favored or opposed by Whigs, Democrats, or Republicans as constitutional or as unconstitutional, everything has depended upon which party was in power at the time. The party of the "Ins" has always stood more or less frankly for liberal construction of governmental powers; the party of the "Outs" for the time being has, with almost equal regularity, denounced as unconstitutional the important measures favored by the opposing party. Neither of the great parties has, therefore, maintained an entirely consistent position on questions of constitutional interpretation.

The reaction against the weakness and failures of the Confederation period, especially among the substantial business interests of the day, placed the advocates of a strong national government in control of all three branches of the government in 1789, and kept them in such control throughout Washington's two adminis-

Federalist  
achievement and  
decline

<sup>1</sup> These divergent views first appeared in 1791 in connection with the question of the right of Congress to charter a bank to serve as the fiscal agent of the new government. See pp. 108-109 above.



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trations.<sup>1</sup> During John Adams's administration also, the Federalists continued in power, but steadily declined in actual strength, partly through factional differences, partly as the result of interference with individual liberty in the enforcement of the Alien and Sedition acts, and as a consequence of the burdensome taxation authorized for an anticipated, but unrealized, war with France. Taking advantage of these embarrassments, and of the reaction against Federalist centralizing and aristocratic tendencies, Jefferson organized the various elements of opposition into a coherent party which first secured control of the executive and legislative branches of the government in the presidential election of 1800.<sup>2</sup>

2. Republican  
supremacy  
(1801-  
1816)

This triumph of the Jeffersonian Republicans marked a change which is often called the party revolution of 1800. Except for two brief intervals, that party remained in power for the next sixty years. During the first sixteen years of the period, the Federalists maintained a constantly dwindling opposition, whose chief strength lay in New England. Finally, the disloyal attitude of many of their New England leaders toward the War of 1812, culminating in the Hartford Convention of 1814, completely discredited the party. Thenceforth, it ceased to be a factor in national politics, a consummation which was facilitated in no small degree by the conciliatory attitude adopted by Jefferson toward propertied groups which had been the backbone of the Federalist party. As time went on, it steadily became easier for Federalists, especially the younger generation, to merge with the Jefferson following, until, after 1816, party lines practically disappeared.

3. Period  
of personal  
politics  
(1816-  
1832)

The third period of party history, beginning here, used to be called the "era of good feeling," because, so far as national elections were concerned, all voters seemed to be merged in one great party, the party of Jefferson. Actually, however, it was far from being an era of good feeling, at all events among the party leaders and their immediate followers. Around half a dozen outstanding personalities, bitterly hostile factions gradually grouped themselves in the years following Monroe's election in 1816, all claiming to be followers of Jefferson and true exponents of Republican principles; and for this reason the period is more appropriately called

<sup>1</sup> Washington himself was neither by instinct nor by training a strong party man; indeed, he looked upon parties as evil institutions and warned his countrymen against them, though as time went on he more and more leaned to the Federalist side. See his Farewell Address, in L. B. Evans [ed.], *Writings of Washington* (New York, 1908), 539.

<sup>2</sup> A. D. Morse, "Causes and Consequences of the Party Revolution of 1800," *Amer. Hist. Assoc. Report* (1894), 531-539.

"the era of personal politics." There were, for example, the "Adams men," looking to John Quincy Adams for leadership; the "Clay men," similarly looking to the popular young "Harry of the West;" the numerous and noisy followers of General Andrew Jackson, the hero of New Orleans. Smaller, but by no means negligible, groups supported the presidential aspirations of William H. Crawford of Georgia, a forerunner of the later strict states' rights school of politicians. Others ardently admired the winsome young John C. Calhoun, who was just entering upon a long and brilliant congressional career and had not, as yet, abandoned his strong nationalistic views to become the foremost champion of states' rights. Finally, a smaller element supported DeWitt Clinton of New York, and vigorously applauded his attacks upon the so-called "Virginia dynasty" which had so long seemed to dictate the choice of presidents.

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This period in which personalities counted for more than policies was essentially a transitional stage in which the new national issues that were to form the basis of party alignment for the next generation were gradually taking shape. The followers of Clay and Adams soon found themselves in substantial agreement in favoring the enlargement of the activities of the national government; and hence, in order to distinguish themselves from other groups, they began, about 1824, to assume the name National Republicans. They strongly advocated and supported the establishment of the second Bank of the United States, a high protective tariff for the benefit of agricultural and manufacturing interests, and an elaborate system of internal improvements constructed at national expense. The success of this combination in electing John Quincy Adams in 1824 inevitably led the supporters of rival candidates to amalgamate under the leadership of one of the most forceful, picturesque, and dominant personalities in all our political history, Andrew Jackson;<sup>1</sup> and in order to distinguish their views from the nationalistic tendencies of the Clay and Adams men and to appear to be true followers of Jefferson, they assumed the name of Democratic-Republicans. With the name soon abbreviated to Democrats, this party became the immediate ancestor of the present Democratic party. It was successful in elevating its leader to the presidency in 1828, reëlecting him in 1832, and electing his chosen successor, Van Buren, in 1836. During these three administrations,

Transi-  
tional  
periodNational  
Republi-  
cansDemo-  
cratic-Re-  
publicans

<sup>1</sup> A. D. Morse, "The Political Influence of Andrew Jackson," *Polit. Sci. Quar.*, I, 153-162 (June, 1886).

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Whigs

Anti-  
Masonic  
party4. Demo-  
cratic and  
Whig  
rivalry  
(1832-  
1860)Lack of  
unity in  
the Whig  
party

the National Republicans had much to say in criticism of the "high-handed," "domineering," and "autocratic" methods of the president; and they liked to represent themselves as the champions of the constitutional rights of the legislative branch of the government against the encroachment of the executive tyrant, "King Andrew." Hence, there was a certain appropriateness in their assumption, about 1832, of the name Whig, imported from England, where a party designated by that term had long been the champion of parliamentary privilege against arbitrary assertions of royal prerogative.<sup>1</sup>

During this transitional period appeared the Anti-Masonic party in 1826—the first formidable "third-party" movement. Short-lived as the party was, it made one permanent contribution to our national party system, *i.e.*, the national convention as a means of nominating candidates for the presidency and vice-presidency. The first such convention was held by the Anti-Masons in 1831, in preparation for the campaign of 1832.<sup>2</sup>

The fourth period of party history, *i.e.*, 1832-1860, might as appropriately be called the period of Democratic supremacy as the period of Democratic and Whig rivalry; for, with two brief interruptions, the Democrats were in continuous control of the national government. This long lease of power is to be explained largely by the greater homogeneity of the Democratic party, by its superior organization, and by the skill of its leaders in harmonizing internal differences, especially those growing out of the slavery controversy. Apart, however, from advocacy of territorial expansion and a strict construction of the constitution, its platforms consisted chiefly of negations—opposition to a national bank, to a protective tariff, and to a general system of internal improvements by the national government. The Whig party, on the other hand, was composed of such diverse, not to say heterogeneous, elements—former National Republicans, Anti-Masons, Nullifiers, and "Anti-Jackson" men—that it seldom presented a united front or placed before the voters a coherent and forward-looking program. It owed its two presidential victories almost entirely to its ability to capitalize for campaign purposes the military popularity of William Henry Harrison in 1840 and Zachary Taylor in 1848. The party's rapid dissolution after 1850 was hastened by a hopeless division within

<sup>1</sup> E. M. Carroll, *Origins of the Whig Party* (Durham, N. C., 1925).

<sup>2</sup> C. McCarthy, "The Anti-Masonic Party," *Amer. Hist. Assoc. Report* (1902), I, 365-574.

its own ranks over the question of slavery in the territories, and especially by the contemporaneous appearance of a new third party called the Native-American, or Know Nothing, party,<sup>1</sup> which drew away both northern and southern Whigs and, in the end, served as a bridge over which most northern Whigs passed into the new Republican party between 1856 and 1860.

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After the defeat of the movement to recharter the second Bank of the United States, which was the principal issue in the election of 1832, the chief party questions for two or three decades were the tariff, the annexation of Texas, and the status of slavery in the territories, together with a whole group of problems subsidiary to the slavery issue. The repeal of the Missouri Compromise prohibition of slavery, in the act organizing territorial governments in Kansas and Nebraska in 1854, convinced hundreds of thousands of Whigs and Democrats that the day of compromises on the question of slavery had passed, and that the aggressions of the "slave power" could be stopped only by placing in control of the national government a party pledged to the restriction of slavery to the states where it already existed. The situation was thus ripe for a fusion of all anti-slavery elements in the country—Liberty-party men (1840-1844), Free Soilers (1848), Anti-slavery Know Nothings, and Anti-Nebraska Democrats—into a new organization under a new name. This was the genesis, between 1854 and 1856, of the present Republican party,<sup>2</sup> which has the distinction of being the only third party in American history that has succeeded in winning enough supporters to give it control of the national government.

Major  
party  
issues  
after  
1832

When the Republicans won their first national victory, in 1860,<sup>3</sup> the party was still heterogeneous and ill-compacted; on only one fundamental principle were the various elements in hearty agreement, namely, uncompromising opposition to the further extension of slavery. The outbreak of the Civil War resulted almost immediately in the disappearance of party lines. Loyal Democrats supported all the war measures of President Lincoln's administration and furnished their share of officers and men in the Union army; many of them came temporarily, others permanently, into the

5. Repub-  
lican  
supremacy  
(1860-  
1884)

The Union  
party

<sup>1</sup> On the career of the Know Nothing party, see J. B. McMaster, *With the Fathers* (New York, 1902), 87-106, and "The Riotous Career of the Know Nothings," *Forum*, XIV, 524-536 (July, 1894); J. F. Rhodes, *History of the United States since the Compromise of 1850* (New York, 1893-1906), II, Chap. VII; T. C. Smith, *Parties and Slavery, 1850-1859* (New York, 1906), Chap. X.

<sup>2</sup> G. S. P. Kleeburg, *The Formation of the Republican Party* (New York, 1911).

<sup>3</sup> E. D. Fite, *The Presidential Campaign of 1860* (New York, 1911).

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Republican party. In recognition of this fusion, and to emphasize the fact that the war was being waged to save the Union, and not to enforce a distinctively Republican policy concerning slavery, the name Republican was soon dropped and that of Union party was substituted. Indeed, the national convention which renominated President Lincoln in 1864 was neither thought of nor spoken of by its members as a Republican convention, but as the convention of a different party, the Union party, whose great objective was the preservation of the Union regardless of the fate of slavery.<sup>1</sup> After the war was over, however, this party quickly disintegrated into radical and conservative factions, which, speaking broadly, coincided with the original Republican and Democratic elements. The conservatives withdrew in large numbers during the exciting congressional campaign of 1866,<sup>2</sup> leaving the Republican radicals in control of the Union party organization. By 1872 the former Democrats had so completely dropped out that the name Union party was replaced by that of National Republican party.

Re-birth  
of the Re-  
publican  
partyGreenback  
movement

During the late sixties and the decade of the seventies, the currency issue made its first appearance in national politics, in the form of a movement for the retention of the "greenbacks" issued during the Civil War, for an increase of the amount in circulation, and for recognition of the authority of the national government to make them legal tender for the payment of debts in time of peace.<sup>3</sup> Three times—in 1876, 1880, and 1884—the Greenback party placed a presidential ticket in the field, polling, however, a maximum popular vote only slightly in excess of 300,000 in 1880.

Liberal  
Republican  
and  
Prohibition  
parties

The presidential campaign of 1872 was distinguished by the appearance of two other third parties, namely, the Liberal Republicans and the Prohibition party. The former were strongly opposed to the reelection of General Grant, and favored a general lowering of the tariff, civil service reform, and a policy of amnesty toward the South. Their presidential candidate, Horace Greeley, was endorsed by the Democratic party, and polled upwards of three million popular votes, carrying seven states and winning sixty-six

<sup>1</sup> W. A. Dunning, "The Second Birth of the Republican Party," *Amer. Hist. Rev.*, XVI, 56-63 (Oct., 1910).

<sup>2</sup> W. A. Dunning, *Reconstruction: Political and Economic* (New York, 1907), Chap. v.

<sup>3</sup> In the last of the Legal Tender Cases, *Juilliard v. Greenman*, 110 U. S. 421 (1884), the Supreme Court upheld the main contention of the Greenback party. After this, the party quickly disappeared. See A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, II, 322-324.

electoral votes.<sup>1</sup> While the Liberal Republican party almost immediately died out, the Prohibition party has been the longest-lived of all our minor or third parties: it has put a presidential ticket in the field in every presidential campaign from 1872 onwards—without, it must be added, ever winning a single presidential elector or receiving a popular vote in excess of 275,000.

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The old sectional issues connected with the Civil War and Reconstruction occupied the foreground until after the election of 1876; but in the decade following, new issues, primarily of an economic nature, steadily forced their way to the front. At the same time, the traditional differences between the major parties over tariff legislation tended to diminish. The Republican party in general became increasingly identified with the maintenance of a high protective tariff; and at the same time the Democratic party showed a growing disinclination to make a "tariff for revenue only," and still less a free trade policy, a sharply drawn issue in a presidential campaign. Aside from certain Democratic platform declarations about the "unconstitutionality" of a protective tariff, the difference between the two leading parties on this subject has steadily tended to become merely one concerning the degree of protection to be given different sections and industries.

New  
issues

The last period of party history is not inappropriately called the period of Republican and Democratic rivalry, for the two parties have contended for control of the national and state governments on more nearly equal terms than previously. During sixteen years of this time, the Democrats have been in power in the White House, and often in one or both branches of Congress as well; during the remaining thirty years, the Republicans have been in similar control.

6. Repub-  
lican-  
Democratic  
rivalry  
since 1884

The most outstanding event in the history of the major parties in this period is the temporary disruption of the Republican party, and the resulting formation of the National Progressive party, in 1912. For upwards of five years preceding that upheaval, there had been two more or less antagonistic groups within the Republican ranks. One element, composed largely of the younger generation of party leaders, and called at first the "insurgents" and later the "progressives," wished to commit the party to a lowering of tariff duties, to new policies of social and industrial welfare legislation, and to increased governmental regulation of big business enterprises. This group also favored various newer instruments or

The  
Progressive  
movement

<sup>1</sup> E. D. Ross, *The Liberal Republican Movement* (New York, 1919).

devices of democracy, such as the direct primary, popular election of senators, the initiative, the referendum, and the recall.<sup>1</sup> To all of these things the older party leaders—the “standpatters” or “reactionaries,” as the progressives called them—were strongly opposed. President Taft’s administration, which fell at this juncture, failed to smooth out these differences; on the contrary, it did much to accentuate them. In endeavoring to bring about the renomination of ex-President Roosevelt on a “progressive” platform in 1912, the reform elements encountered bitter opposition from the old-time leaders, who did not hesitate, both before and during the sessions of the Republican national convention, to avail themselves of every possible technicality and to resort to dubious rulings to bring about the renomination of President Taft and thus defeat the progressive plans. After one of the longest and most bitterly fought of convention contests, the Roosevelt cohorts were beaten by sheer force of numbers, and President Taft received the formal Republican nomination.

The  
National  
Progressive  
party

Thereupon, the great majority of progressive Republicans throughout the country formed the National Progressive party, and adopted a long, specific, and forward-looking program of political, social, and economic reforms, and nominated Roosevelt for the presidency and Hiram Johnson, of California, for the vice-presidency. In the election that followed, Roosevelt received over four million popular votes and eighty-eight electoral votes, while the regular Republican nominee received almost three-quarters of a million fewer popular votes and only eight electoral votes. This Republican debacle enabled Woodrow Wilson, the Democratic nominee, to win, although his popular vote fell more than a million short of the combined Progressive and Republican vote.

Major  
party  
issues

So far as issues between the major parties are concerned, the period since 1884 has been marked, first, by the complete disappearance of the old problems connected with the Civil War and Reconstruction and by the dwindling importance of the tariff as a real party issue. During the nineties, a new currency question, taking the form of the free silver agitation, overshadowed all other questions. About the same time, however, questions pertaining to the control of railroads and the curbing of monopolies, or trusts, were pressing to the front; and after the subsidence of the free silver

<sup>1</sup> J. P. Dolliver, “The Forward Movement in the Republican Party,” *Outlook*, XCVI, 161-172 (Sept. 24, 1910); F. A. Ogg, *National Progress, 1907-1917*, Chaps. x-xi.

movement, these continued to be subjects upon which the two leading parties divided, although even here the differences were not apt to reach to fundamentals. Following the free silver campaign of 1896, an unsuccessful effort was made by the Democratic party in 1900 to convince the electorate that, by the retention of Porto Rico and the Philippine Islands, the Republicans were committing the country to a policy of "imperialism" wholly inconsistent with American traditions. Since the opening of the present century, further regulation of interstate commerce, the reorganization of the country's banking system, the conservation of natural resources, the improvement of industrial and living conditions for the wage-earning classes, and measures for the benefit of the agricultural interests of the nation have received much attention in national party platforms; but these matters again have not developed any fundamental cleavage between the two parties. Likewise, there have been sharp differences of party opinion as to what our foreign policy ought to be, particularly with respect to Mexico, the European nations involved in the World War, and the League of Nations. On the whole, however, major-party platforms in recent years have presented few clear-cut and sharply defined issues of importance or strongly opposed doctrines or tendencies of thought. Both parties have urged important changes in our national policies; but they have usually differed in detail and degree rather than in fundamental principles. With many voters, indeed, the main questions in recent presidential elections have been these: How far do I wish to go in making changes? To which group of leaders do I prefer to entrust the task of shaping our governmental policy and making our laws? Which party seems likely to give the country the more efficient and economical administration?

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Undoubtedly, this disappearance of fundamental differences between the major parties has had much to do with the rise since 1890 of three or four minor parties holding comparatively radical views, especially the People's (or Populist) party and the more recent Socialist party. The Populist party developed in the early nineties out of the Farmers' Alliances as an organ of protest against existing economic and political conditions, especially in the agricultural regions of the South and West.<sup>1</sup> Assailing both of the

Recent  
minor  
parties:

<sup>1</sup> F. E. Haynes, "The New Sectionalism," *Quar. Jour. Econ.*, X, 269-295 (Apr., 1896); F. L. McVey, "The Populist Movement," *Amer. Econ. Assoc. Studies*, I, No. 3 (1896).



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XII1. People's,  
or Popu-  
list, party

old parties for their intimate relations with railroads, banking, and other capitalistic interests of the East—a relationship in which the Populists thought they saw a conspiracy against the welfare of the agricultural classes—the Populists advocated government ownership and operation of railroads and of telephones and telegraphs, postal savings banks, graduated income taxes, and the substitution of national paper money, or greenbacks, for bank notes; and they laid special stress on the necessity for free and unlimited coinage of silver at the ratio of sixteen to one. As remedies for the more distinctively political evils of the day, they urged the popular election of United States senators, the adoption of the initiative and referendum, and the enfranchisement of women. With the adoption of the free silver program by the Democrats in 1896, Populist strength melted away, and the party never again influenced a presidential election after 1892.

2. Socialist  
party

The present Socialist party<sup>1</sup> was organized about 1897, and, with the exception of the Progressive parties in 1912 and 1924, has been the most important of "third" parties in the past quarter of a century. The distinctive politico-economic program of the Socialists calls for "the collective ownership and democratic management" of railroads, telephones and telegraphs, express, steamboat, and other transportation services, and of all large-scale industries; also government ownership of mines, quarries, oil wells, forests, and water power. The social and industrial legislation which is favored differs but slightly from that advocated by the two major parties; and the same is true of many points in the political program, although there are other features—such as the demand for the abolition of the United States Senate, of the veto power of the president, and of the power of the Supreme Court to declare laws unconstitutional, and the demand for direct popular election of president, vice-president, and judges of the federal courts—which find neither standing nor sympathy in more conservative circles. Thus far, the Socialist party has never polled a million popular votes, although twice (in 1912 and 1920) it has closely approached that number; nor has it won a single electoral vote in a presidential election.<sup>2</sup> Its only successes in the field of

<sup>1</sup> There is also a more radical Socialist-Labor party which has had a presidential ticket in the field in recent campaigns; but its popular vote has always fallen short of 50,000. See M. Hillquit, *History of Socialism in the United States* (New York, 1910).

<sup>2</sup> In 1924, the Socialist party united with the new Progressive party in supporting Senator La Follette for the presidency.

national politics have been the election of a single congressman three or four different times since 1910. In state legislatures, and especially in municipal politics, on the other hand, it has made a much better showing, having elected mayors in such cities as Milwaukee, Schenectady, and Minneapolis.<sup>1</sup>

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Between 1916 and 1920, several movements were launched by radical or "liberal" groups for the organization of a new party with more distinctive principles and policies than those of either of the present major parties. One of these movements originated among radical leaders of organized labor and "liberals" who had become dissatisfied with the programs, policies, or leadership of the major parties. They had in view the creation of an independent labor party, analogous to the powerful British Labor party. A sort of fusion of the two groups was effected, in 1920, under the title, Farmer-Labor party, a name which it was hoped would appeal strongly, not only to the industrial classes in cities, but also to the agricultural sections where the Non-Partisan League movement<sup>2</sup> had acquired great strength in the few years preceding. The result, however, was disappointing to the authors of the project; for the presidential candidate of the party in 1920, P. P. Christensen, of Utah, received a total popular vote of less than 300,000.

3. Farmer-  
Labor  
party

The presidential campaign of 1924 witnessed another, and rather more successful, attempt to fuse the Socialists and various other groups dissatisfied with the conservatism of both major parties. A national convention was held at Cleveland, in July, 1924, which nominated, or "endorsed," Senator Robert Marion La Follette, of Wisconsin, for the presidency. The new party, soon assuming the name Progressive, adopted a very specific "program of public service," in which it attacked monopolies, called for government ownership of water power and railroads, and advocated a reorganization of the national banking and taxation systems. The most distinctive feature of the platform and campaign, however, was an attack upon the federal courts and the demand for a

La Follette  
Progressive  
party

<sup>1</sup> For the history of the Socialist party since the World War, see G. S. Watkins, "The Present Status of Socialism in the United States," *Atlantic Monthly*, CXXIV, 821-830 (Dec., 1919); "Revolutionary Communism in the United States," *Amer. Polit. Sci. Rev.*, XIV, 14-33 (1920); J. Oneal, "Changing Fortunes of American Socialism," *Curr. Hist.*, XX, 92-97 (Apr., 1924); D. Karsner, "The Passing of the Socialist Party," *ibid.*, XX, 402-408 (June, 1924); W. J. Ghent, "Collapse of Socialism in the United States," *ibid.*, XXIV, 242-246 (May, 1926); R. S. Kain, "The Communist Movement in the United States," *ibid.*, XXXII, 1079-1084 (Sept., 1930).

<sup>2</sup> F. E. Haynes, *Social Politics in the United States*, Chap. XIII.

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constitutional amendment empowering Congress to override a decision of the Supreme Court declaring legislative acts unconstitutional. In the election, the party's candidates polled slightly over 4,800,000 popular votes,<sup>1</sup> but carried the electoral vote of only one state, Wisconsin.

Party  
organiza-  
tion next  
to be  
considered

Up to the present point, attention has been fixed upon the history of political parties, including some of the principal public questions upon which such parties have divided at different periods. From this we now turn to the organization, or machinery, by which parties in recent years have attained, or sought to attain, their chief objective, namely, control of the government through winning elections and holding public offices. In the remainder of the present chapter, something will be said about national party machinery in general; the chapter that follows will bring into view more especially the party machinery and methods involved in electing our most important national official, the president.

The two  
sets of  
committees

Since about 1840, the machinery of the two major parties has consisted chiefly of two series of committees. One series confines its activities almost wholly to the election of the president, vice-president, senators, and representatives in Congress; and this part of the machinery alone will be spoken of in the present chapter. The other series attends to the same sort of work in connection with the election of state and local officers; and a description of it will be found in a chapter in Part IV of the complete edition of this book. As a rule, national and state elections take place at the same time, however, so that during a presidential campaign the two sets of committees usually coöperate closely. At such times, the policy of the national organization largely dominates state and local party machinery, and the activities of the former almost completely overshadow those of the state and local committees.

The  
national  
committee:

First in importance in the national party organization of the two major parties stands the national committee, whose work has to do mainly with the election of the president.<sup>2</sup> When the national committee first appeared, in 1848, as a part of the Democratic organization of that year, it was designed to serve merely as a temporary piece of party machinery. But since the Civil War its activity and influence have so increased that it is now an impor-

<sup>1</sup> This was approximately 16.6 per cent of the total popular vote. The campaign of 1924 is well summarized in *Polit. Sci. Quar.*, Supplement, XL, 35-59 (Mar., 1925).

<sup>2</sup> See pp. 232 ff. below.

tant political factor all of the time. The committee represents, in theory at least, the whole party constituency throughout the country. Its members are usually experienced practical politicians, keen observers of the trend of political sentiment in their respective states; and as occasions arise they usually find it possible in various ways to promote party harmony and efficiency. They are also not without considerable influence in the distribution of federal patronage falling to their states.

Until 1920, the Republican and Democratic national committees consisted of one member from each state, territory, dependency, and the District of Columbia. In that year, the Democratic party doubled the size of its national committee by authorizing the election of one man and one woman from each state or other unit represented in the national convention;<sup>1</sup> and four years later, the Republicans followed their example. Until 1912, members of both Republican and Democratic national committees were "nominated" by the several delegations in the national convention and formally "elected" by the entire convention.<sup>2</sup> The wide adoption of state direct primary laws has led to some modification of this practice, although, in theory, the national convention continues to elect; where state laws require the choice of national committeemen to be made in a party primary or in some other specified manner, the winning candidate is regarded as "nominated" to the national convention, and the convention proceeds to elect him to the national committee as a matter of course.

The principal functions of the national committee are to decide upon the time and place of holding the national convention, to issue the formal call for the election of delegates, to make preliminary arrangements for the convention, to make up the temporary roll, and, after the convention adjourns, to select a national chairman (in consultation with the presidential candidate) and assist him in the detailed conduct of the campaign. Between presidential elections, the committee usually falls into a state of suspended animation until the approach of the time for the next national convention, although in recent years permanent headquarters, in charge of a permanent staff, have been maintained continuously between presidential elections.

<sup>1</sup> The Panama Canal Zone and the Virgin Islands also have representatives in the Democratic national committee.

<sup>2</sup> For brief historical sketches of the Republican national committee, see G. S. P. Kleeberg, *Formation of the Republican Party*, 191 ff; *Official Report of the Republican National Convention* (1912), pp. 443-447.

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XIIThe  
national  
chairman  
and other  
officers

At the head of the national committee, and serving as commander-in-chief of the party's forces throughout the campaign, is the national chairman, nominally elected by the committee, but in reality the personal choice of the presidential candidate. To the chairman the committee transfers practically all responsibility, with full authority to manage the campaign in all its varied aspects.<sup>1</sup> It endeavors, however, to assist him in every possible way in the execution of the plans which he maps out. The other principal party officials consist of one or more vice-chairmen, elected by the national committee or appointed by its chairman, a secretary and an assistant secretary, and a treasurer. An executive committee is usually named by the national chairman, the members of which serve as his staff officers and advisers during the campaign. The work carried on under the auspices of the national committee is usually handled by a dozen or more bureaus, departments, or divisions, including a speakers' bureau, publicity department, purchasing department, advisory committee, congressional committee, foreign-language division, research division, commercial travelers' bureau, labor division, farm division, club division, and colored women, colored men, and colored speakers' bureaus.

Congress-  
sional and  
senatorial  
campaign  
committees

Comparatively inconspicuous in presidential campaigns, but prominently active in connection with congressional and senatorial elections occurring between presidential elections, are the congressional and senatorial committees which assist in the election of members of Congress bearing their respective party labels. The Republican congressional committee is composed of one congressman from each state having a Republican member in the House of Representatives, nominated by the state delegation and formally elected by a joint caucus of the Republican senators and representatives. The officers, consisting of a chairman, two vice-chairmen, a secretary, and a treasurer, as well as an executive committee of fifteen members, are elected by the general committee. The Democratic congressional committee consists of one member from each state. Usually he is a member of the House of Representatives, and if so, is selected by the delegation from that state. But if the state is without a Democratic representative, the committee chairman appoints some one, usually an ex-member, to represent it. The chairman is elected by the committee, and he appoints the other officers, an executive committee, and such further committees as may be needed. Since the adoption of popular election of

<sup>1</sup> H. Croly, *Marcus Alonzo Hanna* (New York, 1912), Chaps. xvi, xxi.

senators, similar committees have been organized by both parties to assist in the election of party candidates for the Senate. Although these committees are reorganized every two years, the members are generally reelected as long as they remain in Congress and are willing to serve, unless they are candidates for reelection, in which case they retire from the committee during that campaign.

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Upon the opening of a presidential contest, these congressional and senatorial committees place all their resources at the disposal of the national committee and become its close allies, foregoing much of their own initiative, even in what concerns the election of senators and representatives. This is due to the fact that in "presidential years" practically all elections follow the fortunes of the contest for the presidency. But in "off years" these committees are much more conspicuous. They then have entire charge of the congressional campaign, relying, of course, upon the co-operation of state and local committees. They distribute political literature, maintain bureaus of speakers, and raise and disburse money in considerable amounts, giving special attention to doubtful states or districts. They often intervene to smooth out local factional differences. In the interval between elections, they keep in more or less close touch with the district and central committees in the different states, endeavoring in every possible way to strengthen the party organization.

The main purpose behind the creation of our elaborate party organizations, whether national or state, is the same, namely, to instruct voters concerning the issues of the campaign, the policies and records of the rival parties, and the merits of candidates; to arouse the enthusiasm and quicken the loyalty of the rank and file; to win over those who have no definite or permanent party attachment; to make thorough canvasses of voters before election day in order to ascertain the drift of public sentiment; to see that new arrivals and first-voters are properly registered, and to assist aliens in obtaining naturalization; to make sure that the maximum party vote is polled on election day; and finally, if the party wins, to see that party workers are rewarded with places on the public pay-roll, that legislation is enacted which will strengthen the hold of the party upon the voters, and that administrative policies are developed which, in one way or another, will reflect credit upon the party generally.

Purposes  
of party  
organiza-  
tion

In seeking the accomplishment of these ends, party organizations make use of an astonishing variety of means and methods:

Campaign  
methods

mass meetings or "rallies;" parades, barbecues, and fireworks; paid and volunteer campaign speakers and glee-clubs; lawyers', merchants', workingmen's, and many other temporary clubs; organizations of colored voters, of Irish, Jewish, Italian, Scandinavian, Polish, German, and other foreign-born voters; leagues of college and university students; tons of campaign literature; an immense amount of advertising in newspapers and magazines and on billboards; and extensive use of radio broadcasting.

The efficient management and conduct of a presidential campaign necessitates the collection and disbursement of large sums of money; indeed, the first, and often the principal, task of some of the party committees mentioned above is to raise money, *i.e.*, a "campaign fund." This task falls principally to the treasurer of the national committee, or is assigned to a director of finance and a committee on ways and means. Efforts to raise party funds in the last three or four presidential campaigns have consisted largely of appeals to the rank and file of the party in the hope of obtaining numerous small contributions in lieu of the fewer large subscriptions from wealthy individuals or corporations which constituted the main sinews of party warfare before 1912. The new tactics have been designed to awaken a lively personal interest in the success of the party among people who have no mercenary interest in politics, and at the same time to free, so far as possible, the party leaders from any undue sense of obligation to donors of large amounts, especially those who might feel disposed to exact some political reward if their party won the election. In 1920, both major parties developed a more elaborate and far-reaching organization for raising money than in any previous campaign; and both closely modeled their machinery upon the Red Cross and Liberty Loan "drives" of the war period.<sup>1</sup>

Prior to the campaign just mentioned, the maximum party expenditures in connection with a presidential contest appear to

<sup>1</sup> In 1920, both pre-convention and national campaign expenditures were subjected to a searching investigation by the Kenyon committee, a sub-committee of the Senate committee on privileges and elections. A large amount of testimony was taken, which is published in two volumes (Washington, 1921). The conclusions of the committee are printed at the end of the second volume. See *Hearing . . . Pursuant to Senate Resolution 357* (1920), especially I, 1080 ff, 1187 ff, 1384 ff, 1387 ff, 1544 ff, 1572 ff; II, 2125 ff. Similar, though less sweeping, investigations were carried on in the campaigns of 1924 and 1928 by the Borah and Steiwer senatorial committees. The reports of these committees give the names of the principal contributors to the Republican and Democratic national funds. The Borah report may be found in Senate Report No. 1100, 68th Cong., 2nd Sess. (1925); and the Steiwer reports in Senate Report No. 1480 and No. 2024, 70th Cong., 2nd Sess. (1929). The

have been incurred in the "free silver" campaign of 1896. At that time, as the papers and accounts of the Republican national chairman<sup>1</sup> show, the Republicans raised and spent slightly less than \$3,500,000 to help elect President McKinley. No official records of national campaign expenditures were published until 1908. But since that date we have had something more substantial to rely upon than mere estimate or conjecture; for full publicity of both contributions and expenditures was rendered voluntarily in 1908, and since 1910 has been required by national law.<sup>2</sup> The sums raised and expended in connection with the presidential election of 1928 exceeded all known previous records. An amount well over \$10,000,000 was raised for the benefit of the Republican national, senatorial, congressional, state, and subsidiary committees; and the corresponding fund raised for the Democratic ticket amounted to nearly \$7,500,000. The Republicans closed the campaign with a surplus of about \$285,000; the Democrats were less fortunate, incurring a deficit of nearly \$1,500,000.

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The expenditure of these large sums, either to secure a presidential nomination or to enable a party to carry an election, has been regarded by many as fraught with sinister possibilities for our democratic institutions. The general public, uninformed as a rule concerning the legitimate cost of conducting a nation-wide campaign, or even a campaign in a single large and populous state, is prone to regard these amounts as presumptive evidence of an attempt to debauch the electorate. Rival party organizations, or candidates, with more restricted financial resources, regularly take advantage of this popular prejudice and loudly denounce the "slush funds" of their opponents. Yet any fair-minded citizen who will investigate the facts will find that it takes only a few items of a perfectly legitimate nature to aggregate a million dollars or more. The truth is, the "cost of living" for candidates and parties has mounted by leaps and bounds in the past decade or two, as it has for every one else. Like other forms of publicity or advertising, campaigning has come to be tremendously expensive. One reason is that the electorate has been more than doubled in recent years by the extension of suffrage to women; so that, allowing five cents

Large ex-  
penditures  
explained

correctness of the amounts given in these reports is challenged in J. K. Pollock, Jr., *Party Campaign Funds* (New York, 1926), Chap. III; *Amer. Polit. Sci. Rev.*, XIX, 560-562 (Aug., 1925); XXIII, 59-68 (Feb., 1929); XXIII, 681-685 (Aug., 1929).

<sup>1</sup> Marcus A. Hanna. See H. Croly, *Marcus Alonzo Hanna*, 217-220.

<sup>2</sup> *U. S. Compiled Statutes* (1918), pp. 31-34; *Code of the Laws of the U. S.* (1926), pp. 15-17.



for stationery, printing or typing, and postage, two and a half million dollars would be required merely to prepare and mail one circular letter addressed to all of our fifty million potential voters. A nation-wide campaign necessarily involves the expenditure of hundreds of thousands, if not millions, of dollars, in the aggregate, for the rental of headquarters and places for holding political meetings, for printing and distributing campaign literature, for the traveling expenses of speakers and the chief party officials, for a small army of clerks, copyists, typists, tabulators, and addressers, to say nothing of the cost of advertising in newspapers, in magazines, upon billboards, and by radio.<sup>1</sup> When all of these entirely legitimate objects of expenditure are duly listed and footed up, it will not be hard to understand how, in spite of a searching investigation of expenditures (conducted by a senatorial committee) in 1920, in 1924, and again in 1928, practically no evidence has come to light justifying suspicion of wholesale corruption in the campaigns of those years.

The ques-  
tion of  
statutory  
regulation

Nevertheless, many people are strongly of the opinion that some thoroughgoing limitation upon national campaign expenditures ought to be established by law. Thus far, no satisfactory plan has been advanced. Many states have laws which restrict, in one way or another, the amount of money that may be expended in state campaigns, but Congress has passed only two or three measures upon the subject. An act of 1910 undertook to restrict to \$5,000 the amount which a candidate for a seat in the House of Representatives might spend in connection with his nomination and election, and, similarly, to \$10,000 the amount which a senatorial candidate might spend, exclusive of personal expenses, for travel, subsistence, stationery and postage, and a few other specified items. But the Supreme Court has held this law (to be more exact, this law as amended in 1911) to be unconstitutional, in so far, at least, as it applies to expenditures connected with senatorial nominations.<sup>2</sup> Another law was passed in 1907 prohibiting contributions by any corporation to any campaign in connection with the election of president, vice-president, senators, and representatives, and also prohibiting corporations created under national

<sup>1</sup> In 1920, the Republicans spent approximately \$160,000 for billboard advertising alone. For fuller discussion of campaign funds and expenditures, see P. O. Ray, *An Introduction to Political Parties and Practical Politics* (3d ed., 1924), Chap. xi, and J. K. Pollock, Jr., *Party Campaign Funds*, Chaps. iv-vi.

<sup>2</sup> *Newberry v. United States*, 256 U. S. 232 (1921). For summaries and criticisms of this decision, see *Polit. Sci. Quar.*, XXXVI, 472-476 (Sept., 1921); *Amer. Polit. Sci. Rev.*, XVI, 22-25 (Feb., 1922).

law from contributing to any campaign whatsoever.<sup>1</sup> The latest congressional legislation relating to party finance took the form of a rider attached to the Postal Pay and Rate Act approved February 28, 1925. The provisions of this rider embody the main features of the corrupt practices act recommended by the Borah committee in its report upon the campaign of 1924. The new law limits the election expenditure of a candidate for the Senate to \$10,000, and that of a candidate for the House to \$2,500, unless state laws provide a lower maximum. As an alternative, however, an amount may be spent equal to that obtained by multiplying by three cents the total number of votes cast at the last general election for all candidates for the office which the candidate seeks, up to \$25,000 for a senatorial candidate and \$5,000 for a candidate for representative. The act also provides for a careful accounting by all political committees—national, state, and congressional—and for fines of \$10,000 and imprisonment for two years for violations.<sup>2</sup> Although actual abuses are less numerous and less flagrant in national elections than is rather widely supposed, the regulation of the use of money in connection with campaigns and elections is unquestionably one of the most important problems in the field of both national and state politics. Unfortunately, it is a problem for which no wholly satisfactory solution is in sight.

Although it is political parties that exert the most powerful influences upon the shaping of public policy, they are by no means the only effective agencies in this direction. Recent years have witnessed the appearance of a large number of non-political—at all events non-partisan—organizations which have set out to influence the enactment of laws or the determination of administrative policy. Sometimes they do this by direct action upon the governmental agency directly concerned, independently of political parties; at other times, by working through existing party organizations, endeavoring to commit one or all of them to the support of the measures which the non-partisan organization is advocating. In the field of national government and politics, the best known of such non-partisan organizations are the Anti-Saloon League, the Chamber of Commerce of the United States, the National Association of Manufacturers, the National Farm Bureau Federation, the Ameri-

Non-  
partisan  
organiza-  
tions

<sup>1</sup> *U. S. Compiled Statutes* (1918), pp. 31-34; *Code of the Laws of the U. S.* (1926), p. 16, § 251.

<sup>2</sup> The act does not apply to primary elections or nominating conventions. *Code of the Laws of the U. S.* (1926), pp. 15-17. See J. K. Pollock, Jr., *Party Campaign Funds*, Chap. VII.

can Federation of Labor, and the League of Women Voters, formerly the National American Woman Suffrage Association. So powerful have some of these organizations become that national parties, and national, state, and local law-making bodies as well, give at least serious and respectful consideration to whatever measures of public policy they advocate.<sup>1</sup>

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## CHAPTER XIII

### VOTERS AND PARTIES IN ACTION: NOMINATING AND ELECTING A PRESIDENT

The president being the most conspicuous and powerful figure in our governmental system, it is not to be wondered at that in nominating and electing him parties find their most stimulating motivations and the people their choicest political thrills; and we cannot better elucidate and illustrate the popular basis of our political institutions, as outlined in the two preceding chapters, than by looking into the manner in which parties and voters quadrennially go about filling this most important position in the land. Of the presidency as an office—its origin, nature, functions, relationships, and tendencies—it will be more appropriate to speak at a later point.<sup>1</sup>

The  
pageant  
of a presi-  
dential  
election

A new president is hardly ensconced in the White House, with four long years of labor and anxiety ahead of him, before plans are afoot for the next grand trial of electoral strength; and as the red-letter date approaches, potential candidates emerge, "booms" are launched, personal and party groups spar for advantage in the press, on the floor of Congress, and in the swirls and eddies of congressional, state, and local politics. Five months before the choice is to be made, tumultuous national conventions battle over nominations and platforms. A pause intervenes for taking stock of the resulting situation and for throwing the party machinery into high gear; then the race is on. With steady crescendo, the drama advances from scene to scene, until at length, on election day, thirty or forty million people go to the polls and settle the fate of the candidates. Thousands of speeches have been made, floods of ink spilled, millions of dollars spent. Small wonder that the pageant of a presidential election has been described as "the most arresting in the long course of political evolution."<sup>2</sup> Nothing quite like it is to be found in any other country.

<sup>1</sup> See Chap. XIV below.

<sup>2</sup> C. A. Beard, *American Government and Politics* (5th ed.), 163.

Needless to say, this is not at all the sort of thing that the makers of our national constitution envisaged. Not that they failed to give thought to the matter. After the Philadelphia convention adjourned, James Wilson declared that the most difficult question that the delegates had faced was that of the method of electing the president; and the testimony is borne out by the fact that more than thirty distinct votes were taken on the subject. Three main plans were considered. One was direct election by the people. Gouverneur Morris and a few other delegates warmly advocated this method. It, however, won small support, partly because of the fear that direct popular election would play into the hands of demagogues and perhaps lead to the establishment of monarchy, but principally because most members believed that the voters, scattered thinly over what already seemed a large country, would be unable to inform themselves on the qualifications of candidates. In particular, the delegates from the smaller states urged that only under a scheme of indirect election would candidates from such states stand a chance.

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Plans considered in  
1787:  
direct  
popular  
election

Election by Congress found warm support, especially from members who conceived of the president as merely an officer to execute the laws; and this plan was tentatively adopted twice, on one occasion unanimously. Opinion, however, gradually shifted in favor of such a balance of power between Congress and the president as could hardly exist if the latter were chosen by the former; and in the end the convention gave its decision in favor of a proposal for election by the people, not directly, but through the medium of an electoral college. This plan, suggested by Hamilton, seems to have been borrowed from Maryland, where, under the constitution of 1776, members of the upper branch of the legislature were selected by a body of electors chosen by the people every five years. At all events, it seemed a happy solution; the method of electing the president became, indeed, one of the few features of the new frame of government that did not have to be defended against criticism.

Decision  
in favor  
of an  
electoral  
college

The system agreed upon was, in brief, as follows: (1) each state was given presidential electors in number equal to its quota of senators and representatives in Congress; (2) these electors were to be chosen in each state in such manner as the legislature should direct; (3) at the prescribed time, the electors in each state should assemble and each should cast a ballot for two persons, of whom at least one should be a resident of a different state; (4) the result

The system  
originally  
adopted

of this vote in each state should be certified to the president of the Senate, who, in the presence of the Senate and House of Representatives, should open the certificates; (5) an official count having been made, the person obtaining the greatest number of votes, if a majority, should be declared president, and the person obtaining the next greatest number, if a majority, should be declared vice-president; (6) a tie for the presidency should be decided by the House of Representatives, voting by states (each state delegation having one vote), and for the vice-presidency, by the Senate; (7) if no person received a majority of the total electoral vote, the House, again voting by states, should select from the five highest on the list.<sup>1</sup> The people, it was assumed, would choose the electors from among the most capable, far-seeing, and trustworthy men of the respective states; the electors, in turn, would conscientiously weigh the qualifications of persons available for the presidency and, having made up their minds, would cast their ballots as absolutely free agents. It was not expected, however, that the final choice would usually be made by the electors themselves. On each ballot, it was thought, would be likely to appear the name of one person from the elector's own state, and this would so split up the vote that no candidate would obtain an electoral majority. The election would thus be thrown into the House, which, as stated, would choose from among the five highest nominees. Since in doing so it would vote by states, each state having one vote, the small states naturally thought particularly well of the scheme.

Changes  
arising  
from  
practice

For a short time, the plan worked as its authors intended. In 1789, and again in 1792, every elector, indeed, wrote the name of Washington on his ballot. But the second votes were scattered, according to individual preference, among eleven men in the first instance and four in the second. In 1796, thirteen men received votes, indicating as yet a good degree of independence on the part of the electors. But in 1800 every elector except one wrote on his ballot the names of either Jefferson and Burr or Adams and Pinckney. The reason was that by this time two distinct political parties had come into the field, and each had taken steps in advance of the popular election to designate its "candidates" for the presidency and vice-presidency, and also to put before the voters of the several states lists of men who, it was understood, would, if chosen by the people, cast their electoral ballots in all cases for the recognized candidates of the party to which the given electors belonged.

<sup>1</sup> Art. II, § 1.

The effect was, of course, to defeat the main purpose for which the electoral college existed. Instead of exercising independent judgment, presumably based on superior knowledge, the electors now became merely a body to register, in a formal and perfunctory way, the will of the voters who had chosen them. The rise of political parties, entirely unforeseen by the constitution's makers, thus wrought a silent revolution within a decade; without the change of a letter in the fundamental law, indirect popular election became, to all intents and purposes, direct election. The electoral college still forms part of our political machinery. But it has survived only because most persons consider that it does little harm—in other words, because it interposes no effective obstacle to the one thing which it was intended to prevent, *i.e.*, the actual choice of the president and vice-president by the people.<sup>1</sup>

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A way was open for this remarkable transformation without changing a word of the constitution; all that was necessary was for the electors to vote as instructed rather than solely as their own judgment dictated. Further experience, however, brought to light a defect that could be remedied only by a formal amendment. The electors were to vote for "two persons," without indicating which was favored for president and which for vice-president. Accordingly when, in 1800, the Republicans gave their electoral votes exclusively to Jefferson and Burr, a tie resulted—as, indeed, must have been the case every time the electors of the victorious party concentrated their votes unanimously upon the same candidates. Yet this was precisely what the voters, even by 1800, expected the electors to do. The desire, both of the people and of the electors, in the situation mentioned was that Jefferson should be president; very few wanted to see Burr in the office. Yet, on account of the tie, the House of Representatives must decide between the two men, and there was no guarantee that the choice would conform to the Republicans' intention, especially in view of the fact that the votes (one for each state) would in several instances be cast by men of the opposite political faith. Only with great difficulty, indeed, were the Federalists restrained from taking vengeance on their opponents by swinging the election to Burr.

The presidential  
contest  
of 1800

Jefferson was chosen. But before another election came round, the Twelfth Amendment, adopted in 1804, changed the system by

<sup>1</sup> As is pointed out below, abolition of it would raise some rather difficult questions as to a different mode of election (see p. 250), so that to dispense with it would not be as simple a matter as is commonly supposed.



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XIIIThe  
Twelfth  
Amend-  
ment

providing that the electors should "name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president." Thereafter, the two offices were voted for and filled separately, and the major difficulty of 1800 could never arise again, although an election might still be thrown into the House. It remained possible, of course, for the president and vice-president to be members of different parties; and that is still possible. But it is not likely to happen as long as each elector casts both of his votes for the accepted candidates of his own party. The deeply-rooted custom which requires the electors to do this can be depended upon to avert an awkward contingency.<sup>1</sup>

Rise of  
nominating  
machinery

The change that has been described was made by means of formal constitutional amendment. The rise of parties resulted, however, in other important modifications which grew out of, and still rest upon, mere practice. One of these is the loss of discretionary power by the electors, already mentioned. Another is the development of machinery for the selection of candidates in advance of the popular vote. The framers of the constitution made no provision for nominations. Under the electoral system which they had in view, no nominations were required; the voters were to choose electors whose discretion they could trust, and the electors were to cast their ballots for the two men who, in each instance, they considered best equipped for the nation's highest office. As soon, however, as political parties appeared, nominations became a necessity. A prime object of party is to secure control of offices as a means of carrying policies into effect. To accomplish this, the party members must concentrate their votes on particular candidates, which, of course, they cannot do unless the candidates to be so favored are somehow agreed upon in advance of the election. Party rivalry, therefore, presupposes some scheme of nominations.

The con-  
gressional  
caucus

The first device hit upon to this end was the caucus. Caucuses were, indeed, a familiar feature of American politics before 1789. As early as 1763, John Adams commented in his diary on a "caucus club" which met from time to time in the garret of a certain Tom Dawes and chose, *i.e.*, "nominated," selectmen, assessors, collectors, and wardens before they were "chosen in the town." Caucuses

<sup>1</sup> Incidentally, the rise of parties and the adoption of the Twelfth Amendment relegated the vice-presidency to a lower position in popular esteem than had been intended for it. Originally, *all* candidates were to be considered, presumably, with reference to their fitness for the presidency. But after 1804 vice-presidential candidates became a group apart, their qualifications inevitably being judged on separate and less exacting lines. In this respect, the new system was a change for the worse.

played an important part in the Revolution, and by 1800 had become the usual means of choosing candidates for state and local offices. At the date mentioned, they established themselves also in national politics. A Republican caucus may indeed have proposed Jefferson and Burr in 1796, but in any event both Republicans and Federalists nominated presidential candidates by this means in 1800 and for two decades thereafter. As operated in connection with the presidency and vice-presidency, the caucus was composed of the members of the given party in Congress. These persons had, of course, no delegated authority to pick candidates. But they were in touch with political sentiment in their respective states, and besides, no other agency was available.

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As a piece of nominating machinery, the congressional caucus was open to serious objections. It acted by assumed rather than conferred power; it gave little or no voice to the party members in states in which the party was in a minority; and it allowed the legislative branch of the government too much voice in choosing the head of the executive branch. Protest against it was heard from the start; and when, in 1824, it assumed to dictate that the people should support William H. Crawford for the presidency, rather than John Quincy Adams, Henry Clay, or Andrew Jackson, the revulsion was so great that its action was ignored, its candidate was badly beaten, and the caucus itself, as an instrument for presidential and vice-presidential nominations, was dropped entirely from use. For a time, no definite substitute appeared. In 1824, and again in 1828, Jackson, Adams, and other favorites were named by state legislatures, state legislative caucuses, and various unofficial popular gatherings; as late as 1842, Calhoun was placed in nomination (for 1844) by the legislatures of two southern states. Already, however, the demand for the popularizing of party machinery had led in many states to the replacing of the caucus with specially chosen party conventions;<sup>1</sup> and in 1831 both the National Republican and Anti-Masonic parties held national meetings of this nature in preparation for the presidential election of the following year. Candidates were nominated and platforms were adopted; and in 1832 the Democrats fell into line with a convention, although, taking Jackson's candidacy for granted and feeling that the record of his administration formed a sufficient platform,

Rise of the  
nominating  
convention

<sup>1</sup> Occasional state conventions are on record as early as 1792, and in New Jersey the convention system was used regularly after 1810. General adoption of the system in the states came, however, only after 1820.

they found little to do save to nominate Van Buren for the vice-presidency. Many political leaders, including Webster and Calhoun, opposed the new device because it gave the rank and file too much voice in party management. Nevertheless, by 1840 the national convention became the regular means of putting both candidates and platforms before the voters; and such it has remained.

To understand the way in which presidential and vice-presidential candidates are nominated nowadays, it is, therefore, necessary to know something about the national convention—how it is called, of whom it is composed, how it is organized, what is its procedure, and what are its merits and defects.

Arrange-  
ments for a  
convention

The national conventions of the two major parties, and likewise of such minor parties as have built up a permanent organization, are held at the call of the national party committee.<sup>1</sup> In December or January preceding a presidential election, the committee meets, usually in Washington, decides upon the place and date of the ensuing convention, and requests the party members and supporters to choose delegates and alternates according to the apportionment contained in the call. The call is officially communicated to the state committees, and is, of course, published widely in the newspapers. The convention is commonly set for June or early July of the election year, and the place is chosen, usually from a list of competing cities, with a view to the financial assistance and other facilities promised, sometimes also in the hope of influencing political feeling in a given section of the country.

Number of  
delegates

For some time before 1852, the number of votes allotted to each state in a national convention was usually equal to the number of the state's votes in the electoral college. From 1852 to 1872, the state delegations in the Democratic convention consisted of twice this number, but each delegate had only a half-vote. Since 1872, the number has been determined in the same way, but each delegate has had a whole vote;<sup>2</sup> and this likewise was Republican practice from 1860 until after the convention of 1912, when, as will be explained presently, some reductions began to be made in the delegations sent by the southern states. Four delegates, at least, from each state are delegates-at-large;<sup>3</sup> the remainder are district

<sup>1</sup> See pp. 216-217 above.

<sup>2</sup> Except that in the conventions of 1924 and 1928 each state was allowed eight delegates-at-large (half of these being women), each with a half-vote.

<sup>3</sup> If a state happens to have a congressman-at-large (see p. 409 below), it is entitled to two additional delegates-at-large. For provision made by the Republicans in 1923 for still other delegates-at-large, see p. 234 below.

delegates. Furthermore, by courtesy, the District of Columbia and all territories and dependencies (except the Panama Canal Zone and the Virgin Islands, in the case of the Republican convention) are represented.<sup>1</sup> The convention is, therefore, a large body: the Republican assemblage of 1928 contained 1,089 delegates; the Democratic gathering contained 1,100. For every delegate, too, there is an alternate, who, of course, takes part only when needed as a substitute.

Notwithstanding the purely party character of the national convention, its membership was formerly apportioned according to total population, and not at all according to party strength. In the case of the Democrats this is still true: the overwhelmingly Democratic states of the lower South are treated exactly like Pennsylvania, Vermont, and other northern states in which the Democrats are in a hopeless minority. After all, Democratic strength is, however, distributed fairly generally over the country, and the system works only a moderate amount of injustice. In the Republican convention, on the other hand, the plan formerly produced extraordinary results indeed. Until 1928, at all events, one great section, *i.e.*, the "Solid South," yielded relatively few Republican popular votes and, with rare exceptions, no Republican electoral votes at all. Yet states of that section formerly sent many more delegates to Republican conventions than certain northern states which unfailingly roll up substantial Republican majorities; they had great weight in selecting candidates and making platforms, but contributed little or nothing to party victory. Thus, in the convention of 1912, Georgia, which had cast only 41,692 Republican votes four years previously, had twenty-eight delegates, whereas Iowa, with 275,210 Republican votes in 1908, had only twenty-six; and Alabama, Louisiana, Mississippi, and South Carolina, with a total Republican vote of 42,592, had eighty-two delegates, while "rock-ribbed" Pennsylvania, with a Republican vote of 745,779, had only seventy-six.

Disproportionate representation of party membership

For many years, protest against these illogical arrangements was fruitless, although scarcely a meeting of the national committee took place at which the subject was not discussed. The desire of the party to build up some real strength in the South, and the fear of alienating negro support in both North and South, stood in the way of action. In 1912, the rôle played by the grossly disproportionate southern delegations in the Chicago convention—composed

Republican readjustments since 1913

<sup>1</sup> They have, of course, no part in finally electing the president.

as they were mainly of federal office-holders controlled from the White House—became a weighty factor in Republican schism and defeat; and in 1913 the party managers gathered courage to decree that in the 1916 convention congressional districts which had recorded fewer than 7,500 Republican votes in 1912 should have only one delegate instead of two. The effect was to cut off seventy-nine members from eleven southern states. The Chicago convention of 1916 was made up on this basis, and (with slight modification) the Chicago convention of 1920 also. Finally, in 1923, the national committee, acting under instructions of the 1920 convention, introduced an arrangement under which each state became entitled to (a) one district delegate from each congressional district, and an additional delegate from each congressional district casting 10,000 votes for a Republican presidential elector in 1920, or for the Republican nominee for Congress in the last preceding (1922) congressional election, and (b) four delegates-at-large as formerly, with two additional delegates-at-large if the state had a congressman-at-large, and three further delegates-at-large if it was carried by the Republican party in the presidential election of 1920. This somewhat complicated plan did not reduce southern representation as the 1920 convention intended; indeed, it increased the number of southern delegates by nine. It, however, gave 116 more convention seats to northern and western states; and not only was it accepted without protest at the convention of 1924, but that body made it applicable to the convention of 1928, the number of delegates on the latter occasion to be based on the results of the presidential election of 1924 and the congressional elections of 1926. The make-up of the Republican convention is therefore nowadays more in accord with the distribution of party strength than ever before; and the party's remarkable showing in the South in 1928, when Mr. Hoover carried Florida, North Carolina, Tennessee, Texas, and Virginia, gave the existing apportionment—at least for the time being—still stronger justification. Many states (mainly southern) are, however, still greatly over-represented; and the recent falling off of Republican support in such states as those enumerated portends a swing backward toward the earlier disproportionate-ness.<sup>1</sup>

<sup>1</sup> It has been computed that, under the flexible apportionment provided for in the existing rules, the increased Republican vote in the South in 1928 will mean at least fifty more delegates from that section in the 1932 convention than were at Kansas City when Mr. Hoover was nominated. This promises to be notoriously out of keeping with the actual political situation.

Originally, delegates to national conventions were chosen in several different ways—by mass-meetings, by caucuses, by district and state conventions. Gradually it became customary to elect delegates-at-large in state conventions and district delegates in conventions held in the several congressional districts; and by rules adopted in 1884 and 1888 the Republican national committee made this plan obligatory upon the party. The Democrats did not adopt any nation-wide rule, but their selections were commonly made in the same manner.

Shortly after 1900, the direct primary began to be used in various states in nominating candidates for state and local offices, and inevitably the question arose of applying the new device to the choice of delegates to the national conventions. This was first done by Oregon in 1910; and so rapidly did the plan take hold that ten states were able to choose their delegates to the 1912 conventions in this way. As a result, the Democratic national convention of 1912 formally accepted the primary, conducted under either state law or party rules, as a valid method of selecting delegates to the national convention of 1916. The Republican convention of 1912 refused to seat certain delegations chosen under direct primary laws, on the ground that such laws were in conflict with the long-established party rules requiring delegates to be elected by district and state conventions. This position could not, however, in the long run be maintained; and at a special meeting held in December, 1913, the national committee formulated a new rule, which was afterwards adopted, recognizing as valid the credentials of delegates chosen in direct primaries where such primaries were established by state law. By 1916, twenty-two states had mandatory presidential primary legislation; three others had permissive legislation; and more than half of the delegates of both parties were chosen under the plan in that year. There were, however, important differences of form, arising principally from the relation established between the election of delegates by the voters belonging to a given party and the voicing of popular preference among the presidential aspirants within that party. Thus, whereas New Hampshire and South Dakota provided for the popular election of delegates, they afforded no opportunity for the people to vote directly on presidential candidates; Iowa and Minnesota provided for a popular vote on the presidential aspirants, but without obligating the delegates to be guided by the results; and Oregon and Ohio not only gave the voters a means of indicating their presidential pref-

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Methods of  
choosing  
delegates

The presi-  
dential  
primary:

Origins

erence, but undertook to bind the delegates to act accordingly. Certain states also, *e.g.*, Vermont, Michigan, and Indiana, without taking the choice of delegates out of the hands of conventions, provided for a preference vote on presidential candidates in connection with the election of delegates to the state convention.

From time to time, the suggestion was offered that the presidential primary, in some one of its numerous forms, be made nationwide by federal law. Thus, in his first annual message, December 2, 1913, President Wilson urged a plan which would enable the voters of the several parties to nominate directly, and would make of the national convention only a gathering of party officers and nominees for the purpose of declaring and accepting the verdict of the primaries and formulating the platform. Numerous bills looking in this direction, and even to the suppression of the national convention altogether, made their appearance. To this day, no legislation of the kind, however, has been enacted. In actual operation, the new device revealed serious defects—among others, the enormous cost of making a primary campaign over any considerable part of the country. Furthermore, experience with the direct primary in general, in state as well as national elections, proved somewhat disappointing. Constitutional obstacles to the proposed federal legislation also arose. Consequently, the presidential primary movement, after starting off with apparently irresistible force, lost momentum, and since 1916 no additional states whatever have adopted the plan. Indeed, since that date five states have abandoned it—Iowa and Minnesota in 1917, Vermont in 1921, Montana in 1924, and North Carolina in 1927. Furthermore, repeal in North Dakota was prevented in 1927 only by veto of the governor.<sup>1</sup> Those who still believe in the principle very properly point out that it has been tested only through a relatively brief period and under haphazard arrangements which have greatly interfered with its operation, and they urge that, with the aid of uniform nation-wide legislation, the problem both of direct election of delegates and popular expression of presidential preferences can be solved. Doubtless it could be—if the people were sufficiently convinced of the intrinsic merits of the plan and willing to shoulder the expense entailed in disentangling the presidential primary from the state primaries and operating it as a separate piece of political machinery. At the present time,

<sup>1</sup> At the election of 1928, mandatory presidential primary laws were in operation in seventeen states, choosing, in all, 456 Democratic and 496 Republican delegates. In two additional states, Democratic delegates were chosen in voluntary primaries. See *Cong. Digest*, VII, 221-222 (Aug.-Sept., 1928).

however, the plan is decidedly on the defensive; and meanwhile the members of our national conventions continue to be chosen, in not very unequal numbers, under the rival primary and convention systems. Except in 1912, it has not seemed to make much difference whether delegates were chosen by primary or by convention; and even on that occasion the drift of Republican opinion in favor of Roosevelt, as revealed in the primaries, did not enable that candidate to win in the Chicago convention.<sup>1</sup>

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The convention of a major party meets in a great hall, lavishly decorated with flags, bunting, and portraits, and capable of seating usually ten or twelve thousand people. The delegates are accommodated on the main floor, grouped around placards bearing the names of their states; the alternates are seated directly back of them; representatives of the press are given generous space; and the galleries are occupied by the thousands of spectators who are fortunate enough to obtain tickets of admission. "A European," says Lord Bryce, "is astonished to see nine hundred men prepare to transact the two most difficult pieces of business an assembly can undertake, the solemn consideration of their principles, and the selection of the person they wish to place at the head of the nation, in the sight and hearing of twelve thousand other men and women. Observation of what follows does not lessen the astonishment. The convention presents in sharp contrast and frequent alternation the two most striking features of Americans in public—their orderliness and their excitability. Everything is done according to strict rule, with a scrupulous observance of small formalities which European meetings would ignore or despise. . . . Yet the passions that sway the multitude are constantly bursting forth in storms of cheering or hissing at an allusion to a favorite aspirant or an obnoxious name, and five or six speakers often take the floor together, shouting and gesticulating at each other till the chairman obtains a hearing for one of them."<sup>2</sup> Bands play popular airs; noisy and

Physical  
surround-  
ings of the  
convention

<sup>1</sup> A similar Democratic drift toward Champ Clark did not prevent the nomination from going to Woodrow Wilson. In 1916, Hughes was nominated by the Republicans though he had been a primary candidate in only one state; also, in 1920, Harding, beaten in every primary where one had occurred except in his own state. For a full and excellent treatment of the subject, see L. Overacker, *The Presidential Primary* (New York, 1926). Cf. F. W. Dickey, "The Presidential Preference Primary," *Amer. Polit. Sci. Rev.*, IX, 467-487 (Aug., 1915); R. S. Boots, "The Presidential Primary," *Nat. Mun. Rev.*, IX, Supp. (Sept., 1920); and E. M. Sait, *American Parties and Elections* (New York, 1927), 442-449. On direct primaries in general, see C. E. Merriam and L. Overacker, *Primary Elections* (Chicago, 1928).

<sup>2</sup> *The American Commonwealth* (4th ed., 1910), II, 193-194.



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spectacular "demonstrations" break forth from supporters of "favorite sons" or other aspirants; cheering is sometimes kept up for as long as an hour, until sheer physical exhaustion silences it. It is only because most of the real work of the convention is done behind the scenes—in committee rooms, in the living quarters of influential delegates, indeed wherever private conferences can be held and understandings reached—that the body does not degenerate into a mere mob, incapable of any proper performance of its functions.

Temporary  
organiza-  
tion

The sessions usually extend over three or four days. On the first day, the meeting is called to order by the chairman of the national committee, who, after prayer has been offered and the call for the convention read, announces the list of temporary officers agreed on in advance by the national committee. Other nominations may be made, but as a rule the committee's slate is accepted without a contest. The temporary chairman then delivers a speech, prepared before the convention met, in which he eulogizes the party, assails the record of its opponents, urges harmony, and in general sounds the "key-note" of the proceedings. Pending permanent organization, the rules of the convention held four years previously are adopted; and the day's work closes with a roll-call of the states and territories, whose delegations, one by one, announce through their chairmen one of their members to serve on each of the four great committees: (1) credentials; (2) permanent organization; (3) rules and order of business; and (4) resolutions, or platform—although the less wearisome plan is generally followed of permitting the chairmen of the several delegations merely to hand in written lists of committee assignments.

Committee  
reports

The next sessions, extending over at least one day, are devoted to receiving and acting on the reports of these committees. The committee on rules and order of business submits a set of rules based on those of the House of Representatives, together with an order of business which adheres closely to past practice; and its report is usually accepted with little or no discussion. The committee on credentials has the difficult task of awarding contested seats, supposedly on the basis of evidence filed in advance with the national committee. Sometimes, as in the Republican convention of 1912, contests are numerous; and according as they are decided, the scale may be turned for or against control by a given element of the party, or for or against the nomination of a given candidate. Hence, although the list made up and reported by the committee

is usually accepted, heated controversy may arise and the committee may be overruled.<sup>1</sup>

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The next step, normally—although sometimes it is taken before the list of approved delegates is fully made up—is to effect permanent organization. The committee on that subject reports, nominating a list of permanent officials; and ordinarily the persons named are elected without debate. The permanent chairman will have many difficult decisions to make, and he must be both a master of parliamentary law and a man of energy and decision. His first duty, however, is to deliver a long and inspiring speech, dealing with the issues of the day, and borne in these times by radio—as are the convention's proceedings generally—to hearers throughout the length and breadth of the land.

At this point, the practice of Republican and Democratic conventions diverges. The Republicans first build their platform and then select the man to stand upon it. The Democrats first select their man and afterwards make a platform for him. Sometimes the difference of procedure is of no practical consequence. But more than once a Democratic candidate has been embarrassed by provisions inserted in the platform after his nomination was decided upon—or, as in the case of Judge Alton B. Parker in 1904, by the failure of the platform to touch upon an issue regarded by him as vital.<sup>2</sup>

Following the Republican order of procedure, the next event after the speech of the permanent chairman is the report of the committee on resolutions. As a rule, some of the leading delegates bring to the convention trial sets of resolutions;<sup>3</sup> and with these in hand, reënforced with no end of suggestions and admonitions from both delegates and outsiders, the committee labors, often through an entire night, to shape up a platform that will meet the convention's approval and please the voters. If possible, a platform is reported unanimously. Occasionally, however, there is a minority

Framing  
the  
platform

<sup>1</sup> In the interest of harmony, two contesting delegations from a state are sometimes admitted, each member having a half-vote.

<sup>2</sup> In the instance mentioned, the nominee telegraphed the convention that he wanted it understood that he regarded the gold standard as "firmly and irrevocably established," so that if his view was considered objectionable a different candidate might be selected before adjournment. J. H. Latané, *America as a World Power* (New York, 1907), 233.

<sup>3</sup> In 1920, the Republicans set up, in advance of their convention, a committee of inquiry composed of well-known members of the party and charged with the duty of canvassing public opinion on questions likely to call for treatment in the platform. A list of topics was made out, sub-committees were appointed, and questionnaires were sent to large numbers of people. The tabulated results were placed at the disposal of the platform-makers.

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report; and in any case the committee's work is scrutinized closely on the floor of the convention, and is likely to be debated at some length, with or without actual changes. The platform deals with a great variety of subjects, often including matters with which, in point of fact, the government has little or nothing to do. It is likely, also, to abound in generalities, with much appeal to party loyalty and to other sentiment. Its main object is, indeed, not to lay out a definite program to be followed by the party if entrusted with power, but rather to gratify the faithful with a reiteration of time-honored principles, to placate differing wings and factions, and to persuade this group and the other that the party is their friend. Many a platform is practically forgotten after the campaign gets going. Especially was this true in 1928.

Nomina-  
tion of  
candidates

At last, by the third or fourth day, the convention arrives at its main objective, *i.e.*, the nomination of candidates. The secretary calls the roll of states, beginning with Alabama, and each delegation, in its turn, has an opportunity to place a candidate in nomination. If the delegates of a state which stands near the top of the list choose to do so, they may yield to a delegation which otherwise would have no chance to make a nomination until later; and this may give a distinct advantage to the candidate of the state thus favored. As a rule, two or three eulogistic speeches are made in behalf of each candidate,<sup>1</sup> and all possible effort is put forth by the orators and by the delegates and spectators supporting a given candidate to rouse enthusiasm for him. Noisy demonstrations, sometimes spontaneous, but usually carefully prearranged, interrupt the proceedings for periods up to, and even exceeding, an hour. As many as ten or a dozen candidates may be nominated, though commonly the number does not exceed five or six.

The "unit"  
and "two-  
thirds"  
rules

When all the nominations have been made, the convention proceeds to vote.<sup>2</sup> The roll of states is called again, and the delegations, through their chairmen, announce their votes. Under earlier Republican procedure, each delegate might usually vote as he liked; although sometimes he was bound by instructions from the party organization at home. In any case, he had a right to have his vote recorded separately. If, as often happened, a delegation cast its

<sup>1</sup> Convention oratory tends to emotionalism and extravagance, although sometimes—as in the case of Ingersoll's "Plumed Knight" apostrophe, placing Blaine in nomination at Cincinnati in 1876—it rises to the level of real eloquence.

<sup>2</sup> No printed or written ballots are employed in national conventions; all voting is oral. The term "ballot" is, however, commonly used to designate a vote.

entire quota of votes for a given candidate, this was only by coincidence, or, at the most, voluntary agreement. The Democrats followed the different plan of permitting the state convention to require the delegates to the national convention to cast their votes in a block for one candidate; and even if no such requirement was imposed, the delegation itself might, by majority vote, determine how the electoral votes of all of its members should be recorded. This historic "unit rule" conformed to the states' rights antecedents of the Democratic party, and it had the practical advantage of augmenting the power and importance of a state in the convention's proceedings. The rise of the presidential primary, however, brought some readjustment of the practice of both parties. On the one hand, the Republicans—while holding fundamentally to the plan described above—gave somewhat larger recognition, even though unofficial, to the principle of instructed delegations. On the other hand, the Democrats found it necessary to relax the rigor of the unit rule. This they did in 1912 by adopting a new regulation permitting delegates to have their votes counted independently of the unit rule if their states (a) required election by congressional districts and (b) had not expressly subjected the district delegates to the authority of the state convention or state committee.<sup>1</sup> In all other cases, the unit rule is still to be recognized and enforced. Another important difference of practice between the two major parties is that, whereas a simple majority of all votes cast is sufficient to nominate in a Republican convention, the Democrats require two-thirds. The "unit rule" and the "two-thirds" rule are closely connected. As long as the former is maintained, even in the modified form of 1912, the latter is practically necessary as a means of preventing a few large states from completely controlling the nominations. But there has been strong demand for the abrogation of both.<sup>2</sup>

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After the votes of all of the states have been recorded and counted, the result is announced. Sometimes a single ballot suffices. But more often the votes are so distributed among several candidates that no one has the requisite majority and other ballots must be taken. Gradually, as the voting proceeds, candidates whose cause

The  
balloting

<sup>1</sup> *Official Report of the Democratic National Convention of 1912*, pp. 59-76.

<sup>2</sup> The two-thirds rule was decreed by President Jackson in connection with the Democratic convention of 1832, and has prevailed in every convention of the party since that time except in 1840. On more than one occasion it has prevented the party's strongest candidate from receiving the nomination. It probably did so in 1924.

is recognized to be hopeless cease to have more than a straggling support or drop out altogether, and their votes are bestowed elsewhere, until at length some one of the contestants—or, if necessary, a “dark horse”—emerges a victor. Sometimes the contest is very prolonged. Forty-nine ballots were required to nominate Franklin Pierce in 1852, and fifty-three to nominate General Scott in the same year. Garfield was nominated on the thirty-sixth ballot in 1880, and Woodrow Wilson on the forty-sixth in 1912. The extreme case, however, was the nomination of John W. Davis on the one hundred and third ballot in 1924.

The nomination for the presidency having been made, the wearied convention hurries its work to a conclusion. A candidate for the vice-presidency is still to be named; and the same procedure—roll-call, nominating and seconding speeches, and balloting—is followed. But the contest is usually not very keen, and a decisive vote is soon reached. As a rule, the choice is determined largely by the relative “availability” of the candidates in the light of the selection that has been made for the presidency. An eastern presidential nominee, for example, calls for a western vice-presidential nominee; an arch-conservative must usually be counter-balanced with a man of known liberal views. If the vice-presidential candidate will improve the party’s prospects in a doubtful state or group of states, or will lend popularity to the ticket the country over, so much the better. But on the whole, in the words of a recent writer, the office is “lightly esteemed and carelessly bestowed.”

Having elected—or at all events endorsed—the new national committee (whose members are actually selected in the various ways indicated above), the convention authorizes the chairman to appoint two special committees consisting of a representative from each state to bear formal notification to the candidates; and thereupon it adjourns *sine die*.

At an early date, the new national committee meets, and a chairman is chosen, nominally by the committee, though actually by the presidential candidate. In due course, sub-committees and auxiliary committees are made up; a treasurer is appointed; headquarters are opened, usually in both an eastern and a western city; a “campaign text-book” (containing the platform, notification and acceptance speeches, biographies of the candidates, statistics and testimonials tending to substantiate party arguments, and much miscellaneous material) is published and widely dis-

tributed; a speakers' bureau is organized; and under the supreme direction of the national chairman an appeal for votes is launched which is kept up, with increasing ingenuity and intensity, throughout the four months or more during which the campaign lasts. Meanwhile, in each state, the parties make up their lists of presidential electors, in some states by the use of the primary, in others by convention nomination; and ballots are prepared on which (except in a few states) the lists of electors are printed in parallel columns, under the appropriate party symbols. When the people finally go to the polls, they think of themselves as voting for president and vice-president; and, barring certain contingencies, they do actually determine who shall fill these two offices. In form, however, they vote only for the electors; and sometimes the names of the presidential and vice-presidential candidates do not appear on the ballot.<sup>1</sup>

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To many persons it would come as a surprise to be told that the presidential electors were not always chosen exclusively, or even mainly, by popular vote. A national law dating from 1845 requires that they be elected in all cases on the Tuesday following the first Monday in November; but as for the mode of selection, there is no nation-wide rule except a simple constitutional provision that each state shall determine the matter for itself by action of its legislature. At the outset, the choice was made in most cases by the legislature itself; in 1792 the legislature elected in nine states and the people in only five. If this situation had continued, there would have been small place for the elaborate machinery for popular participation and appeal described in the foregoing pages. In a period of advancing democratic sentiment, however, it was not to be expected that the president would continue to be chosen by electors and the electors themselves by legislatures; and by rapid stages the people broke through to direct and full control. The device of electors was encased in the constitution, where it is still to be found. But this did not prevent transforming the theoretically independent electors into mere automatons to register the popular will. Legislative choice of the electors themselves rested only on state action, and in state after state it was displaced by direct popular election, so that from 1832 onwards the legislature

The  
choice of  
electors

<sup>1</sup> On the other hand, six states (Nebraska, Iowa, Wisconsin, Illinois, Ohio, and Michigan) omit the names of electors from the ballot and print only the names of the presidential and vice-presidential candidates. See L. E. Aylsworth, "The Presidential Short Ballot," *Amer. Polit. Sci. Rev.*, XXIV, 966-970 (Nov., 1930).

elected only in South Carolina, and there only until the Civil War.<sup>1</sup>

In states in which the electors were from the first chosen by the people, it was at one time not unusual to employ a district system, under which one elector was chosen by the voters of each congressional district and two were elected by the voters of the state at large. The competition of political parties, however, caused this plan to lose favor. Under the district system, the electoral vote of a state was likely to be divided among two or more candidates. To win the full vote, it was necessary for a party to carry every district. The alternative was, of course, a general ticket system, under which a party could make a clean sweep merely by securing a plurality throughout the state as a whole. Enhancing, as it did, the general importance of a state in national politics, this plan won the support both of party leaders and of public sentiment. In 1832, only four states retained the district system; and they soon gave it up. Michigan adopted it in 1891, but only temporarily.<sup>2</sup> The general ticket system does not, it should be noted, absolutely preclude division of a state's electoral vote. A fusion agreement between two parties may result in a parceling of the vote, on predetermined lines.<sup>3</sup> Or, without any fusion, a sufficient number of voters may "scratch" the ticket, *i.e.*, vote for electoral candidates on two or more lists, to prevent any party from securing all of the places. This actually happened in Maryland in 1908 and in California in 1912. But such results are very rare.

"Minority"  
presidents

A plurality in the electoral college wins; and this leads to mention of the fact that several presidents have been "minority" presi-

<sup>1</sup> Florida, in 1868, and Colorado, in 1876, reverted temporarily to legislative election.

<sup>2</sup> The Democratic legislature of a state which was normally Republican sought in this way to ensure that in the approaching presidential election the Democrats would secure a share of the electoral votes. The plan succeeded; nine Republican and five Democratic electors were chosen. But when the Republicans regained control of the legislature, the earlier system was revived. The general ticket system gives an enormous political advantage to the party that is dominant in a state. A reversion to the district system is, accordingly, always pretty certain to be temporary; "when the normally dominant party regains control of the legislature the law is repealed, or if the party that enacted it becomes dominant it is for the same reason repealed." J. C. Allen, "Our Bungling Electoral System," *Amer. Polit. Sci. Rev.*, XI, 687 (Nov., 1917). The Michigan law of 1891 was sustained by the Supreme Court in *McPherson v. Blacker*, 146 U. S. 1 (1892).

<sup>3</sup> The best illustration is the agreements between Democrats and Populists in a total of twenty-six states in 1896. E. Stanwood, *History of the Presidency*, I, 564-565.

dents, in the sense that they (strictly, the electors who chose them) were voted for by fewer than half of the people who went to the polls. Lincoln, in 1860, obtained only a plurality, not a majority, of the popular vote. Wilson, in 1912, received two million more popular votes than did his nearest competitor, Roosevelt; yet he lacked a majority. In both of these cases, the opposition was unusually divided. But the same thing can happen under entirely normal circumstances, even if there are but two tickets in the field. Hayes was elected over Tilden in 1876, although his popular vote was smaller, whether the Republican or the Democratic count be accepted; and Harrison triumphed over Cleveland in 1888, although with one hundred thousand fewer votes. Indeed, in the last thirteen elections, the successful candidate has received a majority of the popular vote only eight times. All that a candidate needs in order to obtain the full electoral vote of a state is a plurality of the popular vote in that state. Popular pluralities, no matter how small, in a sufficient number of states—and no very great number, if the list includes populous states like New York, Pennsylvania, and Illinois—ensure election. Wilson's six million popular votes in 1912 were so distributed as to win 435 electoral votes; Roosevelt's four million were so distributed (involving pluralities in only six states) as to win only 88; Taft's three and one-half million curiously contained only two pluralities, *i.e.*, in Vermont and Utah, and yielded only eight electoral votes.<sup>1</sup>

The fact that the entire electoral vote of a state falls to the candidates who poll a mere plurality of the popular vote leads the parties to concentrate their campaign efforts upon doubtful states, especially those which have a large electoral vote. New York is such a state; and the party managers are never likely to forget that in 1884 fewer than six hundred popular votes swung that state's thirty-six electoral votes to Grover Cleveland, and that it was these votes that made him a victor over the Republican candidate. This intensification of party activity in pivotal states is disadvantageous in that it presents a special temptation to party

<sup>1</sup> The arithmetic of our presidential elections presents no end of curious features. In 1928, 1,067,586 Democratic votes in Pennsylvania and 2,089,863 in New York failed to yield a single presidential elector. On the other hand, it would have required a shift of only 416,055 votes in certain close states, out of a total presidential vote of over thirty-six millions, to make Mr. Smith president instead of Mr. Hoover. For an interesting exposition of how the 1928 election would have worked out under a proposed constitutional amendment leaving each state its present allotment of electoral votes but distributing them, in each state, among the candidates in proportion to their popular votes, see *Proportional Representation Rev.*, 3rd ser., No. 94 (Apr., 1930).



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the elec-  
toral vote

workers to resort to vote-buying and other corrupt or dubious practices.

The theory of the constitution is that the electors are officers of their respective states, and it was on this account that the states were left free to determine how they should be chosen. The place where each group meets within its state is fixed by the legislature thereof (being, naturally, the state capital); and if the electors receive any remuneration for their services, it must come out of the state treasury. National law, however, requires that in all cases they shall meet and vote on the first Wednesday (formerly the second Monday) of January following their election. And the Twelfth Amendment of the constitution enjoins that the voting shall be by ballot; that presidential and vice-presidential candidates shall be voted for separately; that distinct lists shall be made up showing all persons voted for for either office, with the number of votes received by each; and that these lists, signed and sealed, shall be transmitted to the president of the Senate at the seat of the national government.<sup>1</sup> As evidence of their power to act, the electors transmit also their certificates of election, bearing the signature of the governor.

Counting  
the elec-  
toral vote

The constitution is curiously vague on the counting of the electoral vote; and out of that circumstance arose, in 1876, a very serious dispute. The Twelfth Amendment says that "the president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." But who shall make the count? The constitution is silent. It might be inferred that the president of the Senate is himself to do it; and for more than a quarter of a century this was the practice. But suppose that conflicting returns are sent in from a state. Who shall decide which returns shall be received and which ones shall be rejected? Such a question actually arose in connection with the election of 1820, and Congress itself took jurisdiction.

The  
disputed  
election  
of 1876

On this basis, matters went along well enough until 1876. Then, however, a situation developed which startlingly revealed the inadequacy of existing arrangements. Tilden, the Democratic candidate, received 184 undisputed electoral votes; Hayes, the Re-

<sup>1</sup> An act of 1887 requires that the lists shall be transmitted also to the secretary of state (at Washington), who is now primarily the custodian of them. Formerly, the lists were sent from each state by special messenger. Under the terms of an act of 1928, however, they began in that year to be sent by registered mail. Copies are required by this measure to be sent also to the state's secretary of state and to certain other officials.

publican candidate, received 164; from four states—Oregon, Florida, South Carolina, and Louisiana, with a total of twenty-one electoral votes—came conflicting returns. Tilden lacked only one vote of a majority—which meant, of course, that if any one of the contests was decided in his favor he would become president. The Senate was Republican, the House of Representatives was Democratic; and the rules required that no electoral vote whose validity was questioned should be counted unless the two houses, acting separately, should concur.<sup>1</sup> For obvious reasons, neither house desired this regulation to apply in the present case. Accordingly, it was repealed, and after much controversy an extra-constitutional body—an electoral commission consisting of five senators, five representatives, and five justices of the Supreme Court—was created to examine into and decide the several disputes. The commission included eight Republicans and seven Democrats, and, whether or not for this reason, every contest was decided in favor of Hayes, who was accordingly elected, without a vote to spare. The country was kept in suspense until within two days of the time for the new president to be inaugurated.

When the excitement died down, public-spirited men of both parties began looking for some way of preventing similar trouble in the future. The problem was, however, a thorny one, and a decade passed before any agreement could be reached. Finally, in 1887, an Electoral Count Act undertook to meet the situation. Recognizing that presidential electors are state officers whose appointment is certified by the governor, and who meet and discharge their one duty within the state and under state authority, the new law placed responsibility for settling disputes as far as possible upon the states themselves. Its authors could not, however, blink the fact that there still might arise disagreements within a state that would result in conflicting returns; and provision was, of necessity, made that in such a case the two houses of Congress, acting separately, should decide which set of electors was entitled to be recognized. Obviously, the houses might themselves disagree. And in that event, whichever returns had the advantage of being certified by the executive of the state should be counted; but if there were none such, all should be rejected, and the state should simply lose its vote in that particular election.<sup>2</sup>

The  
Electoral  
Count Act,  
1887

<sup>1</sup> This "twenty-second joint rule" dated from 1865.

<sup>2</sup> It is to be noted that, even when there is no dispute, Congress can scrutinize the electoral vote in any state to determine whether it has been "regu-

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present  
law

It cannot be said that this settlement is ideal, or necessarily final. In the first place, its constitutionality has been questioned, on the ground that the constitution does not authorize Congress to exercise any control whatever over the electoral system.<sup>1</sup> In the second place, there are practical objections. If a dispute comes to Congress, and the two houses fail to concur, the vote of the state affected may be lost altogether. It may, perhaps, be said that if a state cannot settle its own disputed elections, it ought to be made to pay this penalty. Nevertheless, such disfranchisement is inherently undesirable. But more serious is the possibility that a deadlock between the two houses of Congress may cause the title to the presidency and vice-presidency to be still in doubt when the fourth of March arrives. Fortunately—or perhaps unfortunately—there has as yet been no occasion to put the existing law to a test. An experience of the kind would undoubtedly give impetus to the oft-made proposal that the whole matter be regulated in a constitutional amendment which, among other things, should provide for some arbiter between the two houses in case of disagreement during an electoral count.<sup>2</sup>

The  
electoral  
count  
as now  
carried  
out

Ordinarily, of course, the counting of the electoral votes is a mere formality; the country knows three months in advance what the result will be. On the second Wednesday in February—a month after the electors have met in their respective states—the members of the two houses gather in the hall of the House of Representatives, with the vice-president (or president *pro tem.* of the Senate) in the chair. Two tellers have previously been appointed by each house. Starting with Alabama, and proceeding in strict alphabetical order, the presiding officer opens the certificates transmitted by the several electoral bodies, hands them to the tellers, who read them aloud and record the votes, and announces the outcome, which is duly entered, with a list of the votes, in the journals of the two houses. The person receiving the greatest number of votes for president, provided the number is a majority of the whole number of electors chosen, is declared elected; and similarly in the case of the vice-presidency.

larly given," *i.e.*, cast, counted, and reported in the manner prescribed by the constitution and laws. If either house decides that in any instance there has been irregularity, the state's votes are not counted.

<sup>1</sup> W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), II, 1461-1465.

<sup>2</sup> For a fuller analysis and criticism of the law as it stands, see J. H. Dougherty, *The Electoral System of the United States* (New York, 1906), Chap. IX.

In the event that no candidate for president receives a majority, the election is, of course, thrown into the House of Representatives, where each state has one vote, to be bestowed as the majority of the state delegation determines. Until 1804, as we have seen, the choice of the House in such a contingency was to be made between the candidates who were tied, if there was a tie, or among the five highest on the list, if there was simply a lack of a majority. The Twelfth Amendment, however, provided for selection among "the persons having the highest numbers not exceeding three." A majority of all the states is necessary to elect. Since 1801, the president has been chosen by the House only once, *i.e.*, in 1825, when John Quincy Adams emerged victor over Jackson, Crawford, and Clay. If no candidate for the vice-presidency obtains a majority of the electoral vote, the Senate—the members voting as individuals—choose from the highest two, and a simple majority elects. Vice-President Richard M. Johnson was elected in this way in 1836.

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Provision  
in case of  
lack of a  
majority

It is, of course, quite possible that the House of Representatives might fail to elect, because of the lack of a majority for any one candidate. In that event, the newly chosen vice-president would, on March 4, become president. But if the presidential election were thrown into the House, the vice-presidential election would be likely to be thrown into the Senate; and the senators, voting as individuals, might conceivably deadlock on the two candidates before them. During the three-cornered campaign of 1924, the political complexion of the two houses was such as to bring these embarrassing contingencies into view and cause a considerable amount of public uneasiness. The results of the polling showed that there had been no real ground for apprehension. Nevertheless, many people felt that it ought not to be left even remotely possible for March 4 to arrive with no president-elect or vice-president-elect ready for inauguration. The best legal opinion has been that, as matters stand, the secretary of state—being by the act of 1886 next in line of succession after the vice-president, and being not restricted to a four-year term—would become acting president, should such a situation arise; although whether he would serve a regular term of four years or whether Congress would arrange for a new election has been a matter of doubt.<sup>1</sup>

Inadequacy  
of the  
present  
arrange-  
ments

<sup>1</sup> The Gifford "lame duck" resolution proposing a constitutional amendment changing the meeting time of Congress—passed by 289 to 93 in the House of Representatives on February 24, 1931 (but not accepted by the Senate)—contained the following provision: "If the president-elect dies, then

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the elec-  
toral sys-  
tem

Proposals for altering the methods of electing the president and vice-president have been discussed from time to time throughout our entire national history. The Twelfth Amendment remedied certain defects, and various statutes, *e.g.*, the Disputed Presidential Elections Act, dealt acceptably with others. But the chief anomaly remains, namely, the electoral college. This institution serves no purpose for which it was created; the people choose the president quite as truly as if they voted directly for him, and the electors merely go through the formality of translating the results into the form required by an archaic section of the constitution. Why not abolish the electoral college altogether and permit the people to choose the president in form as well as in fact?

The proposal is plausible, yet it raises questions of some difficulty. Should the people of the country as a whole, without reference to state or other interior lines, elect by a simple plurality or majority vote? Or should they vote by states, or by districts? The proposal to throw the entire country into one grand constituency and elect by a majority or plurality of the total popular vote has met with small favor.<sup>1</sup> If any change is ever made, it is likely to preserve to the states, as such, some definite rôle in the electoral process. Two main possibilities suggest themselves: (1) direct popular vote for president and vice-president, election to be by, perhaps, a popular plurality in a majority of states; (2) direct popular vote, to be converted automatically, without the intermediation of the present electors, into an electoral vote, and election to be by a majority or plurality of this electoral vote. The first plan is objectionable because it would enable a number of the smaller states to swing the election by means of only a minority of the total popular vote; although it is not to be forgotten that we have "minority" presidents under the existing system.

Furthermore, save for the elimination of the electoral college, the second plan offers no assured gain, except under one condition: if the electoral vote of the state were to be determined on a district basis rather than on a general ticket basis, a way would be

the vice-president-elect shall become president. If a president is not chosen before the time fixed for the beginning of his term, or if the president-elect fails to qualify, then the vice-president-elect shall act as president until a new president has qualified; and the Congress may by law provide for the case whether neither a president-elect nor a vice-president-elect has qualified, declaring who shall then act as president or the manner in which a qualified person shall be selected, and such person shall act accordingly until a president or vice-president has qualified."

<sup>1</sup> For objections to it, see J. C. Allen, "Our Bungling Electoral System," *Amer. Polit. Sci. Rev.*, XI, 703 (Nov., 1917).

opened for some degree of proportional representation, and it would not happen, as it does now, that a state's entire electoral vote would go to a given candidate notwithstanding that the popular vote was almost evenly divided. As is evidenced by the action of Michigan in 1891, supported by a decision of the Supreme Court, there is no legal obstacle to the employment of the district plan to-day. The considerations of state pride and party advantage which originally caused the district system to be abandoned are, however, no less influential in our time than formerly. Only by a constitutional amendment could the plan be put into uniform use throughout the country; and, notwithstanding its manifest advantages over the present system, its advocates can hardly hope for its adoption. The one obvious disadvantage would be the increased temptation to party majorities within the several states to gerrymander the electoral districts.

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Desirability of  
a revival  
of election  
by districts

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# PART III

## THE NATIONAL GOVERNMENT

### CHAPTER XIV

#### THE PRESIDENT AND HIS CABINET

Difficult as it was for the makers of our national constitution to agree on many questions that confronted them, they were never far apart on two main points: (1) that both the national and state governments should be governments of limited powers; and (2) that the powers assigned to the national government, being of three different kinds, should be distributed among an equal number of separate and largely independent authorities. How the first of these decisions was carried into effect, we have already seen: the national government was expressly made a government of limited and enumerated powers; and the state governments, while left with broad, residual, unenumerated powers, were nevertheless hedged about with restrictions designed to keep them in their proper spheres and to protect the ultimate supremacy of the nation.

Two  
funda-  
mental  
principles  
of our  
govern-  
mental  
system

The doctrine of separation of powers was no invention of the men assembled at Philadelphia. A generation earlier, the French philosopher, Montesquieu, had expounded it in a widely-read volume entitled *The Spirit of Laws*, and indeed had argued that the superiority of England's government to that of his own country arose from the parcelling out of powers across the Channel among crown, Parliament, and courts. Before him, Locke had argued for the separation principle—as also, two milleniums earlier, had Aristotle himself. Locke and Montesquieu were familiar to eighteenth-century America, and in 1787 their teachings were accepted as political gospel. Already the idea of separation had been voiced by colonial legislatures, and from New Hampshire to Georgia, Revolutionary state constitutions had grounded new or revised plans of government upon it. The Articles of Confederation totally ignored it; the political system for which they provided was so simple and restricted that there really were no

The  
separation  
of powers



separate authorities to be set off from one another. But when the discredited Articles were cast aside and an adequate national government was created, the new scheme was deliberately worked out with a view to making separation of powers one of its most prominent and treasured features.

Three great branches of government were provided for—executive, legislative, and judicial—and upon each was bestowed the functions and powers deemed most appropriate. This was the trilogy for which Montesquieu argued, although no doubt it was deduced by the framers directly from the experience of the colonies and states themselves. And to this day, both our national and state governments are organized in accordance with it. Of course, the fathers were not so naïve as to suppose that a government could be constructed in three water-tight compartments and yet work with unity and precision. The three must be tied up, and even dovetailed, together. Indeed, there had been experience enough with an excessively strong executive in colonial days, and afterwards with excessively strong legislatures, to suggest the desirability of placing each branch under certain checks or restraints by one or both of the others. "Checks and balances," accordingly, became a familiar secondary feature of the system. The Senate shares the appointing and treaty-making powers of the president; Congress as a whole makes or withholds appropriations required to carry out executive policies; the president signs or vetoes measures passed at the other end of Pennsylvania Avenue; and the courts rule on the constitutionality of acts of both the executive and the legislature, thereby presumably upholding the balance between the two branches, just as they also seek to preserve that between the nation and the states.

Though, as ideas, far from originating on this side of the Atlantic, separation of powers and checks and balances, as working devices of government, are characteristically American; no political system elsewhere assigns them an equal degree of importance. People accustomed to the cabinet form of government look upon them as of doubtful utility; and in later days they have come in for plenty of criticism from Americans as well. Undeniably, they give rise to a great deal of controversy and delay; often they result in deadlock and sheer inability to act. We have inherited, however, a scheme of government organized from top to bottom in accordance with them; and while they have not entirely prevented one department from growing at times, and even perma-

nently, at the expense of others, they still determine the main lines on which our political machinery is arranged and operated.<sup>1</sup> In turning now to a study of the form and workings of the national government, we therefore take up the three great branches in order—first, the executive (considered broadly as including the president, the executive departments, and the agencies of administration), then the legislature, *i.e.*, Congress, and finally the judiciary. We begin with the chief executive, *i.e.*, the president.

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The authors of the Articles of Confederation had in mind an extremely simple governmental system, with powers of such modest proportions that no executive, outside of Congress and its committees, would be needed. Experience soon showed, however, that a separate chief executive was no less desirable in the national government than in the state governments; and when the Philadelphia convention set to work to reconstruct the federal system, the principal plans presented for consideration, although differing widely in other respects, agreed in providing for a distinct executive branch. But what should be the form and status of the executive? Here arose many troublesome questions. Should supreme executive power be entrusted to a single official, or should it be vested in a board or commission? How should the executive be chosen? What should be the term, and should more than one term be permitted? In case a single executive was provided for, should a council be associated with him, on the analogy of the governor's council in the states? Above all, what should be the executive's powers, and what relations should the executive have with other parts of the governmental system? No questions that came before the convention roused greater differences of opinion than some of these. On twenty-one different days, the general subject of the executive was under discussion; on the method of election alone, more than thirty separate votes were taken.<sup>2</sup>

The  
problem  
of the  
executive

A decision in favor of a single, rather than a plural, executive was reached with no great difficulty. Most foreign precedents pointed in this direction, and every one of the American states had a single executive, *i.e.*, a governor or a "president." The plan

A single  
executive  
decided  
upon

<sup>1</sup> For an illuminating discussion of separation of powers by Chief Justice Taft, see *Hampton v. United States*, 276 U. S. 394 (1928). On checks and balances there is nothing better than H. L. McBain, *The Living Constitution*, Chap. v. For Madison's defense of checks and balances as desirable limitations upon the separation of powers, see *The Federalist* (Lodge's ed.), No. XLVII.

<sup>2</sup> M. Farrand. *The Framing of the Constitution*, Chap. xi.

offered the obvious advantages of prompter action and more concentration of responsibility; and while it might seem to open the way for executive tyranny, and even for monarchist manœuvres, fear of such abuses was allayed by prescribing a fixed term, restricting powers, and providing for removal by impeachment. If the executive had been made, as some members desired, nothing more than an agency to carry into effect the will of the legislature, the plural form would probably have been adopted; and this might have led to a parliamentary, or cabinet, type of government, on the English pattern. But after it was decided that the executive should be a coördinate branch of the government, drawing its authority independently from the people and charged with many duties besides the enforcement of the acts of Congress, it was both natural and wise to gather power and responsibility into the hands of a single person.

Term and  
reëligi-  
bility

Several members of the convention were willing that the president should hold office during good behavior, and Hamilton expressed a preference for life tenure, subject to removal by impeachment. The prevailing sentiment, however, favored a fixed term, and the question narrowed down to a seven-year term without eligibility to reëlection or a four-year term with no such restriction. At one stage, the seven-year plan was adopted. But when it became clear that the president was not to be chosen by Congress, the main objection to reëligibility disappeared, and the briefer term, without restriction as to reëlection, was substituted.

Precedents  
against  
a third  
term

In the course of time, the tradition grew up which practically limits a president to two terms. Washington's advanced age and dislike of party strife led him to refuse to be a candidate for a third term. Jefferson could doubtless have been elected a third time, but he also declined. Jackson's popularity would probably have ensured him a third election; but he publicly endorsed the policy of his predecessors in the matter and threw his support to another candidate. General Grant, in 1880, was induced to break with precedent by seeking a nomination for a third, although non-consecutive, term. But the public disapproved, and the effort failed. In 1912, Theodore Roosevelt also sought a third term, after being out of office for four years. President Taft received the regular party nomination; whereupon the Roosevelt following organized a new party, nominated their leader, and launched a campaign which won many more votes than the regular Republican candidate secured. The third-term aspirant was, however, not elected;

and while there is nothing to prevent similar attempts in the future, the episode undoubtedly strengthened the popular conviction that two terms for a president are enough. President Coolidge's announced decision in 1927 not to run for reelection in 1928 did not keep a large amount of third-term talk from being indulged in as campaign time approached; and, wisely or unwisely, the Senate was induced by a skeptical opposition group to adopt a resolution declaring against any departure from the no-third-term principle. This pronouncement was, of course, a mere expression of opinion, wholly devoid of legal effect. Naturally, the point was made by Coolidge supporters that even if the existing incumbent should be renominated (as he undoubtedly could have been) and reelected, he would have had only two full, elective terms in office. But an amendment to the resolution making it applicable only to presidents who had served "two elected" terms was rejected.<sup>1</sup>

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Some people, indeed, believe that it would be better if the president were not eligible to even a second term. Being eligible, he can hardly escape temptation to shape his course, especially in making appointments and wielding the veto power, with a view to reelection; and in so far as he yields, the country's interests are liable to suffer. President Wilson was elected in 1912 on a platform which advocated a constitutional amendment making the chief executive ineligible for reelection;<sup>2</sup> and in 1913 the Senate, by a vote of 47 to 23, adopted a resolution in favor of an amendment lengthening the presidential term to six years and forbidding any person who had held the office by election or under operation of the law of succession to hold it again "by election." Though reported favorably by the judiciary committee, this proposal did not come to a vote in the House of Representatives; and revival of it in the next Congress was similarly barren of result. After the

Proposal  
for a  
six-year  
term

<sup>1</sup> The resolution, introduced by Senator La Follette, and adopted on February 10, 1928, by a vote of 56 to 26, reads as follows: "Resolved that it is the sense of the Senate that the precedent established by Washington and other presidents of the United States in retiring from the presidential office after their second term has become, by universal concurrence, a part of our republican system of government, and that any departure from this time-honored custom would be unwise, unpatriotic, and fraught with peril to our free institutions." Cf. J. B. McMaster, "The Tradition Against the Third Term," *Atlantic Monthly*, CXL, 374-381 (Sept., 1927); W. B. Munro and W. Lippman, "Shall We Break the Third Term Tradition?," *Forum*, LXVIII, 162-172 (Aug., 1927).

<sup>2</sup> The candidate did not himself endorse this plank. On the contrary, in a letter written early in 1913 (though not made public until 1916) he declared that a "fixed constitutional limitation to a single term of office" would be "highly arbitrary and unsatisfactory from every point of view." *Amer. Year Book* (1916), 34.

excitement attending the election of 1912 died down, popular interest in the subject subsided. The fact, however, that some sixty resolutions in all had been introduced in Congress, at one time or another, declaring for a single six-year term, created a presumption that the question would come up again; and it was indirectly involved in proposals before the Senate in 1924 for eliminating "short sessions" of Congress and bringing the houses into session in the January following elections.<sup>1</sup> We have, too, the opinion of at least one former president that the change ought to be made.<sup>2</sup>

The constitution contemplates presidential elections only at regular four-year intervals—not, as in the French republic, whenever a vacancy arises. Accordingly, arrangements must be made for filling out a term in case the president dies, resigns, or is removed by impeachment; and the constitution itself provides for a vice-president, who is to take up the duties of president whenever the office falls vacant or the president is himself unable to discharge them.<sup>3</sup> No president has resigned;<sup>4</sup> none has been removed, although the impeachment proceedings against Andrew Johnson failed by a single vote; and no president has been incapacitated to such an extent or for so long a period as to lead to an assumption of presidential functions by the vice-president, although such a transfer of authority was seriously discussed after the wounding of President Garfield by an assassin's bullet in 1881, and also during the earlier stages of President Wilson's illness in 1919-20.<sup>5</sup> Six presidents, however, have died in office, and six vice-presidents have in

<sup>1</sup> See p. 415 below. The single-term resolution was defeated by a vote of 45 to 10; but the question was not considered independently on its merits.

<sup>2</sup> W. H. Taft, *Our Chief Magistrate and his Powers*, 4.

<sup>3</sup> In the eye of the written constitution, a vice-president thus succeeding to office is only "acting president," not president; hence in 1927 it was argued that another term for Mr. Coolidge would not be a third term. The "unwritten constitution," however, recognizes no such distinctions; and, as is so often the case, it is the unwritten constitution that governs.

<sup>4</sup> On the way in which a president or vice-president may resign—a matter unprovided for in the constitution—see note by E. S. Brown in *Amer. Polit. Sci. Rev.*, XXII, 732-733 (Aug., 1928). No president has resigned, and only one vice-president, i.e., John C. Calhoun in 1832. Cf. *Code of the Laws of the U. S.* (1926), p. 21, § 23.

<sup>5</sup> J. Kerney, "Government by Proxy," *Century Mag.*, CXI, 481-486 (Feb., 1926). No definition of presidential inability is laid down in the constitution or the laws, and there is no specification of who is to decide when the president's disablement is so serious and prolonged that an acting president is necessary. A joint resolution introduced by Mr. Fess in 1920, and again in 1921, embodied a constitutional amendment under which such decisions should be made by the Supreme Court, at the request of Congress; but on neither occasion was the proposal reported by the committee to which it was referred.

consequence assumed the duties of the presidency. Since Van Buren, no vice-president has been elected president unless he had first succeeded to the office by the death of the incumbent.

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The vice-president is elected at the same time and in the same way as the president. Unless an emergency makes it necessary for him to assume the powers and duties of president, he has no constitutional function except to preside over the Senate; even there, he is not a member and has no vote except in the case of a tie. He is, in reality, an executive officer, with, however, only potential, rather than actual, powers and functions. But he may at any moment be called upon to take the helm of the government, and it goes without saying that he will do well to keep informed on the state of public affairs and on the policies and plans of the administration. An obvious means to this end would be attendance at cabinet meetings. John Adams, when vice-president, attended one or two such meetings, but the precedent was not followed up, and when President Taylor proposed to invite Vice-President Fillmore to sit as an *ex-officio* member of the cabinet, he was advised—quite wrongly—that such an arrangement was not possible. In 1908, Mr. Bryan promised that, if elected, the vice-presidential candidate, Mr. Kern, would sit in the cabinet; and Vice-President Marshall presided over a number of cabinet meetings during President Wilson's absence in Europe in 1918-19.

The vice-president's share in the work of government

Attendance at cabinet meetings

President Harding, in 1921, became the first president to invite the vice-president to sit with the cabinet regularly; and for two years or more Vice-President Coolidge attended meetings, taking a place, however, at the foot of the table in the capacity of a supernumerary and rarely participating in the discussions. It was commonly supposed that this practice would be continued, and after Mr. Coolidge became president by election in 1924 he gave the vice-president-elect, Mr. Dawes, to understand that he would be welcome at cabinet sittings. Mr. Dawes, however, indicated that he preferred not to attend; and the president—who, on the basis of his own experience, had no very strong attachment to the plan—did not insist. There was some regret at this abandonment of the Harding policy, because in so far as a seat in the cabinet tended to increase respect for the vice-presidency as an office, it served a useful purpose. Political parties have been far too prone to make use of the position to placate a faction defeated in the contest for the presidential nomination, or to bring on the ticket a representative of a given element or geographical section, or to serve other pur-

poses dictated by party expediency rather than by the thought that the person selected stands a good chance of being called upon to fill the highest office in the land. The plan, however, while in theory excellent, yielded no very definite benefits when tried, and is not likely to be revived.<sup>1</sup>

If occasion arises, the duties of the presidency devolve upon the vice-president. But, obviously, there is no guarantee that at any given moment there will be a vice-president; this official may himself have died,<sup>2</sup> resigned, been removed, or become incapable of attending to public business. Moreover, after a vice-president has assumed the presidency, there would be no one—unless further arrangements were made—to step into his place, should necessity arise. Accordingly, the constitution empowers Congress to “provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officers shall then act as president.”<sup>3</sup> The first legislation on the subject, passed in 1792, provided that the president *pro tempore* of the Senate should succeed, or in case no such official should be available, the speaker of the House of Representatives. For several reasons, this was not a satisfactory plan. Under it, the presidency would devolve upon a person who had been sent to the national capital to be, not an executive, but a legislator. It might also bring the government under the direction of a chief executive belonging to a different party from that to which the president and vice-president had belonged. Still more serious, if both the president and vice-president should die during the interval between the expiration of one Congress and the meeting of the next, there might be no president of the Senate, and there certainly would be no speaker of the House. Despite these shortcomings, the law stood unchanged for almost a hundred years. But in 1881 the death of President Garfield, some weeks before a newly elected Congress was organized, brought the matter vividly to the country’s attention, and five years later a new presidential succession act withdrew the officers of the legislative houses from the succession and substituted an ar-

<sup>1</sup> C. O. Paullin, “The Vice-President and the Cabinet,” *Amer. Hist. Rev.*, XXIX, 496-500 (Apr., 1924). With a view to giving the vice-president something really important to do, and thereby making the office more attractive to men of first-rate ability, it has been proposed that he be made director of the budget, or even head of one of the executive departments. But this would be against all tradition, and on other grounds objectionable.

<sup>2</sup> In point of fact, six vice-presidents have died in office, but luckily not one, as events proved, who would have been called upon to assume the duties of his deceased chief.

<sup>3</sup> Art. II, § 1, cl. 6.

rangement under which, after the vice-president, the heads of the executive departments should succeed, in the order of the establishment of the departments, *i.e.*, the secretary of state, the secretary of the treasury, the secretary of war,<sup>1</sup> etc., with due regard for the constitutional qualifications of age, citizenship, and residence. Never as yet, however, has the succession actually passed beyond the vice-president.<sup>2</sup>

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Three absolute qualifications for the presidency are prescribed by the constitution. The president must be at least thirty-five years of age; he must have been a resident of the United States for at least fourteen years; and he must be a "natural-born" citizen. In order not to exclude foreign-born citizens who had helped bring the new government into being, *e.g.*, Alexander Hamilton and James Wilson, all citizens of the United States at the time of the adoption of the constitution were exempted from the last-mentioned requirement. But with the passing of the generation which saw the new frame of government adopted, the rule debarring the foreign-born came automatically into complete operation. Inasmuch as the vice-president may at any time be called upon to take up the duties of the presidency, he must, of course, have all of the qualifications required for that office.

Qualifica-  
tions

Benjamin Franklin argued in the Philadelphia convention that, since wealth and power are the corrupting ambitions which human nature finds it hardest to resist, the president should be paid no salary whatever. But though the famous Pennsylvanian had the reputation of being the wisest man in the world, his motion was not even put to a vote; and by constitutional provision the president receives a salary, with the safeguard that it can be neither increased nor diminished during the period for which he has been elected. He is forbidden to receive any other emolument, either from the United States or from any state. But this is construed

Salary and  
allowances

<sup>1</sup> So the act of 1886 states, and, therefore, such is the legal order of succession. In point of fact, the next department created after the Department of State was not the Department of the Treasury, but the Department of War, and the succession act is thus curiously in error.

<sup>2</sup> By inadvertence, no provision was made for the situation that would arise if both the president-elect and the vice-president-elect should die or become incapacitated after the electoral colleges have adjourned, but before the fourth of March; or, again, for the contingency of failure to elect either a president or a vice-president by reason of (a) lack of a majority of electoral votes for any candidate, (b) lack of a majority in the House of Representatives (voting by states) for any presidential candidate, and (c) deadlock in the Senate preventing the election of a vice-president. On this deficiency, see, further, p. 249 above. Cf. M. A. Musmanno, *Proposed Amendments to the Constitution*, 76-81.



not to prevent the United States from providing him with a mansion (the White House), a suite of executive offices, and special allowances for vehicles, furniture, repairs, clerk-hire, and travel, amounting to some three hundred and fifty thousand dollars a year.<sup>1</sup> Originally fixed at \$25,000 annually, the president's salary was raised in 1871 to \$50,000, and in 1909 to \$75,000. The vice-president receives \$15,000, with \$10,000 additional for a secretary and clerk-hire.

Some presidents put in longer hours and work harder than others, but for none is the office a sinecure; few are as fit when they leave the White House as when they entered it. There is, first of all, a vast amount of administrative routine. Much can, of course, be turned over to subordinates; but much also is of such a nature that the president cannot escape it. The daily grist of correspondence is exacting and time-consuming. Heads of departments, members of Congress, party leaders, spokesmen of business interests, and a wide variety of other people must be given personal interviews. Delegations, official and unofficial, must be welcomed. Appointments to public office make heavy demands. When Congress is in session, there are bills to be studied, programs of legislation to be mapped out, innumerable conferences to be held; and even during legislative recesses, much may need to be done for the furtherance of legislative projects which the chief executive has at heart. Foreign relations call for much—in times of stress, almost constant—attention. Preparation of messages and of public addresses chains the president to his desk; cabinet meetings, official entertainment of foreign and other guests, interviews with representatives of the press, and participation in public ceremonies take their toll of energy and time. And as if all this were not enough, the president is expected to exercise a general watchfulness over the state of the country and at times of stress or crisis—such as the stock-market crash of 1929 or the unprecedented drought of 1930—to devise, guide, and lead in carrying out measures of relief and remedy. Though of late the White House "secretariat" has been increased in numbers and improved in efficiency, President Hoover finds even less leisure than did most of his predecessors, not simply because by nature he is a "twelve hour a day man," but because the volume of necessary work to be done mounts from year to year and almost from day to day. It goes without saying that in war-time the

<sup>1</sup> W. Hard, "The White House Plant," *World's Work*, LVIII, 46-53, 106-116 (Jan., 1929).

president's burdens and responsibilities become almost too much for the strongest man to bear.

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As early as 1781, when the first executive departments were created by the expiring Continental Congress, it was suggested that their principal officers should consult together as an advisory council, and in the convention of 1787 several plans for a council—a council of appointment, a council of revision, or a general advisory council—were considered. No proposal on the subject, however, was adopted, and it remained for a definite, recognized, official advisory group to form around the president, not in response to constitutional or statutory stipulations, but as a mere matter of convenience and usage. To this day, the “cabinet”—composed of the heads of the ten executive departments, *i.e.*, State, War, Treasury, Justice, etc.—although an exceedingly important part of our governmental machinery, is, as such, unknown to the written constitution and known only incidentally to the ordinary law.<sup>1</sup> Differing widely from the English cabinet in composition, functions, and powers, it at least resembles that remarkable institution in being a product of spontaneous historical development.<sup>2</sup>

Question  
of an  
executive  
council

From the beginning of his administration, Washington, in addition to calling on the heads of departments for written opinions, as authorized in the constitution, orally consulted various principal officers, including the department heads; and in 1791 meetings began to be held which closely resembled the cabinet meetings of later days. In 1793, the disturbed international situation caused these consultations to become more frequent, and the cabinet—the name also came into use at this time—began to take on the aspect of a recognized and accepted institution. Some people shook their heads and predicted that from the “cabinet conclave,” unknown to the constitution, would flow all manner of abuses. But, under the existing circumstances, the development was inevitable. In common with other public men of the day, Washington originally supposed that the Senate would serve substantially as an executive council. But when he appeared on the floor of that house to consult about certain Indian treaties, the demeanor of the members clearly showed that they did not take this view of their functions, and the expected relationship did not

How the  
cabinet  
arose

<sup>1</sup> On the way in which the term “cabinet” was first brought into statute law, see H. B. Learned, *The President's Cabinet*, 157-158.

<sup>2</sup> F. A. Ogg, *English Government and Politics*, Chaps. VI-VII.

develop. Furthermore, contrary to practice in England and in the colonies, the courts, in 1793, assumed the position that they would not give opinions, even to the president, except in the decision of actual cases; hence the need of consultation could not be met in that direction. Finally, the House of Representatives discouraged, and practically prevented, heads of departments from appearing in person before it in order to submit reports and give explanations. The effect of all of these things was to force the president and heads of departments into a more isolated position, and to compel them to rely upon one another for opinions and advice to an extent which at first was entirely unanticipated.<sup>1</sup>

Varying  
relations  
of the  
cabinet  
with the  
president

Originating thus almost at once after the government under the constitution was set going, the cabinet has had a continuous, and on the whole an honorable, history to the present day. It remains, however, what it was at the outset—a purely advisory body. The president can make much use of it, or little, or none at all, as he chooses. Looking upon the heads of departments as mere clerical officers, and preferring the advice of his personal friends, official and otherwise, Jackson early discontinued cabinet meetings altogether;<sup>2</sup> and some other presidents, *e.g.*, Grant, have leaned but lightly on their cabinet advisers. On the other hand, certain presidents, *e.g.*, Pierce, have consulted their cabinets at every turn and have usually followed the advice received. An able cabinet can go far to make up for the deficiencies of a weak president, and can also give added strength to a strong one.

Meetings  
and  
influence

Nowadays, the cabinet meets ordinarily twice a week, except during vacation periods. The subjects discussed are for the most part those which the president himself brings up, although department heads may bring up others—usually with the president's assent given in advance. Naturally, attention is devoted chiefly to questions involving the general policy of the administration, such as the attitude to be taken toward the World Court, or toward a tax reduction bill, or toward an increase of the army. But there are no limits except those of time and interest, and in practice the discussions range very freely and broadly over the government's work and policy, not omitting, of course, party matters also. Proceedings are decidedly informal. There are no rules of debate; free interchange of opinion takes place on a conversational

<sup>1</sup> The beginnings of the cabinet are described fully in Learned, *op. cit.*, Chap. v.

<sup>2</sup> W. MacDonald, *Jacksonian Democracy*, 50-51.

basis; only rarely is there a vote; no minutes or other official records are kept.<sup>1</sup> Furthermore, such decisions as are reached are mere recommendations. Just as the president is free to submit or not submit a subject for consideration, so is he free to make any final disposal of the matter that he likes. Ordinarily, he will be influenced by the opinion of the men whom he has specially selected as his advisers. But if he thinks that their advice is not sound, he is under no compulsion to follow it. It is he, not they, who will have to bear responsibility before the country for whatever is done. "Seven nays, one aye—the ayes have it," announced Lincoln, following a cabinet consultation in which he found every member against him. Cabinet discussions bring out useful information and opinion, clarify views, and develop morale in the administration. They help the president choose his course on pending and proposed legislation. But they do not culminate in decisions upon policy by mere show of hands.<sup>2</sup>

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<sup>1</sup> A good deal of interesting information about cabinet proceedings can be gleaned from published correspondence, memoirs, and autobiographies of ex-members. An illustration is the *Letters of Franklin K. Lane* (Boston, 1922).

<sup>2</sup> The relations of the president and heads of departments will be further brought into view in chapters dealing with presidential powers and functions (xv-xvi) and the organization and workings of the administrative system (xvii-xix). On the relations of the cabinet members and Congress, see pp. 317-319 below. The salary of heads of departments was raised in February, 1925, from \$12,000 to \$15,000.

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## CHAPTER XV

### THE PRESIDENT AS CHIEF EXECUTIVE

The founders of our government broke with the trend of English political development by establishing an executive of the presidential, rather than the cabinet, or "parliamentary," type. In actual practice, the difference between the two forms is not as great as the theory of the matter would lead one to suppose. Nevertheless, the two represent distinctly different solutions of one of the major problems arising in any governmental system, *i.e.*, the relation between the legislature and the executive. An executive of the cabinet type is composed of members of the legislature, is directly responsible to the popular branch of the legislature, and holds office so long as it commands the support of a working majority in that body. The legislature is the supreme authority, even though in practice the cabinet may, as in present-day Britain, so largely direct the legislature's proceedings as to be, to all intents and purposes, the controlling force. The British cabinet is the best-known executive of this variety, although the cabinets of France, Germany, Canada, Australia, and numerous other countries are equally good examples. A presidential executive, on the other hand, is entirely outside the legislature, draws its authority from non-legislative sources, is not responsible to the legislature in any manner affecting executive tenure, and takes rank as a distinct branch of the government, coördinate with the legislative branch. This is the sort of executive that we have in the United States, both in the state governments and in the national government. It was adopted for the reason that, despite brief experiments in one or two colonies with election of the governor by the assembly, our political experience up to 1775-89 did not run in the direction of a cabinet system. Rather, it was such as to lead the makers of our constitution to aim at the preservation of liberty through a balance of power among separate and coördinate branches of government.<sup>1</sup>

"Presidential" and "cabinet" governments

<sup>1</sup> The cabinet and presidential types are compared in W. H. Taft, *Our Chief Magistrate and his Powers*, Chap. I; H. L. McBain, *The Living Consti-*

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of the  
president's  
executive  
power

The president, therefore, as chief executive in the national government, occupies a detached position and has power and functions which, in the main, are quite different from those of Congress and the courts. Some of his powers are expressly conferred in the constitution, *e.g.*, the appointment of civil and military officers (with the advice and consent of the Senate) and supreme command of the army and navy. Only a few brief clauses<sup>1</sup> are, however, devoted to this subject, and a large part of presidential power arises, rather, from implication and interpretation. Much can be inferred—to cite a single illustration—from the pledge required of the president at his inauguration to “preserve, protect and defend the constitution.” Still other powers spring from acts of Congress, passed in pursuance of its own direct or implied powers, and assigning to the president specific tasks and responsibilities. When, for example, Congress establishes a new executive department, a new diplomatic post, or a new commission, it automatically extends the president’s power of appointment. When it, passes a tariff act, such as the Hawley-Smoot Act of 1930, authorizing the president to approve or veto rates fixed by the Tariff Commission, it obviously puts into his hands an important power over foreign trade.

The ques-  
tion of  
inherent  
power

A question that has often been discussed is whether the president has inherent executive power. Does he have power, outside of the constitution and laws, simply because he is the chief executive? On one occasion, the Supreme Court inclined to this view;<sup>2</sup> and President Roosevelt, after going out of office, confessed that he had acted on the principle that it was not only the president’s right, but his duty, “to do anything that the needs of the nation demanded unless such action was forbidden by the constitution or the laws.”<sup>3</sup> The basic feature of our national government is, however, that it is a government of limited powers—of only such powers as are enumerated or implied in the constitution, which

*tution* (New York, 1927), Chap. iv; C. G. and B. M. Haines, *Principles and Problems of Government* (rev. ed.), 286-302; W. W. Willoughby and L. Rogers, *Introduction to the Problem of Government*, Chaps. xvii-xviii; A. V. Dicey, “A Comparison between Cabinet and Presidential Government,” *Nineteenth Century*, LXXXV, 25-42 (Jan., 1919); W. Wilson, *Congressional Government* (Boston, 1885); and W. MacDonald, *A New Constitution for a New America* (New York, 1921).

<sup>1</sup> Art. II, §§ 2-3.

<sup>2</sup> In the *Neagle* case (135 U. S. 1). See W. H. Taft, *Our Chief Magistrate and His Powers*, 88-91; W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), III, 1473-1474.

<sup>3</sup> *Autobiography* (New York, 1916), 139-140.

clearly means that no executive power—or power of any other sort—is inherent. “The true view of the executive functions is, as I conceive it,” wrote President Taft, “that the president can exercise no power which cannot be reasonably and fairly traced to some specific grant of power or justly implied or included within such express grant as necessary and proper to its exercise. Such specific grant must be either in the constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.”<sup>1</sup> President Roosevelt was politically-minded, President Taft legally-minded; and the view of the latter seems clearly the more correct.

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The broadening out of the president's powers by interpretation and statutory elaboration has, however, gone so far as to make the sum total of presidential authority immeasurably greater than the constitution's framers intended it to be.<sup>2</sup> Much depends, of course, upon the personality of the president himself; under an Andrew Jackson or a Theodore Roosevelt there is naturally an increase of influence, if not a positive expansion of power. The character of the times also makes a difference; in the Civil War, and again in the World War, the presidency rose to heights of authority undreamed of in days of peace. Regardless, however, of both personalities and circumstances, the president has come to be—with the exception, of course, of dictators like Mussolini, and probably also of the British prime minister—the most powerful executive officer in the world. Among the three great branches into which our national government is divided, the executive is the only one which in the past hundred years has definitely developed at the expense of the other two. The judiciary is now holding its own fairly well. But to many acute observers, it appears that the president is pushing Congress farther and farther into the background.”<sup>3</sup>

Magnitude  
of presi-  
dential  
power

Viewed comprehensively, the president's powers and functions fall into three main groups: (1) those that are purely executive; (2) those that have to do with legislation; and (3) those that arise out of extra-constitutional, but usually weighty, obligations of

Principal  
executive  
powers

<sup>1</sup> *Our Chief Magistrate and His Powers*, 139-140.

<sup>2</sup> It is to be noted, however, that the constitution enumerates the powers of the president in considerably less specific manner than those of Congress and the courts.

<sup>3</sup> L. Rogers, “The Enlarged Powers of the President,” *Contemp. Rev.*, CXXXIII, 39-47 (Jan., 1928); W. B. Munro, “Our President's Increasing Power,” *Curr. Hist.*, XXXIII, 825-829 (Mar., 1931).



party leadership. Executive powers, in turn, fall into five chief categories: (1) enforcement of the laws and maintenance of domestic peace, with the somewhat related powers of pardon and reprieve; (2) appointment and removal of civil and military officers; (3) direction of executive and administrative work, including ordinance-making; (4) management of foreign relations; and (5) control of the military and naval establishments, together with the conduct of war. These several phases of presidential executive activity will be commented on briefly in the order indicated.<sup>1</sup>

The prime duty of any executive is, of course, to *execute*; and the most solemn obligation that the constitution imposes on the president is to "see that the laws are faithfully executed." The oath of office which he takes requires him to "protect and defend" the highest law of all, *i.e.*, the constitution; and the general nature of his position makes it his function likewise to guard all federal instrumentalities and property. Normally, he does these things by pacific, and even routine, supervision and direction of the executive and administrative machinery which the constitution and laws have provided for the purpose. But if necessity arises, he may make full use of the army and navy, and likewise of the militia of the states when called, according to act of Congress, into federal service. Congress has passed numerous measures authorizing the use of both the national and state forces in law enforcement<sup>2</sup>—even though, so far as the army and navy are concerned, the president would have the power in any case. "The entire strength of the nation," the Supreme Court has said, "may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the constitution to its care. . . . If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."<sup>3</sup>

<sup>1</sup> Legislative and party functions are considered in Chap. xvi below.

<sup>2</sup> The series began with (1) the militia act of 1795, which authorized the president to call forth the militia whenever the execution of the federal laws was obstructed by combinations too powerful to be suppressed through the ordinary course of judicial proceedings, and (2) an act of 1807 which authorized the use of the army and navy under similar circumstances.

<sup>3</sup> *In re Debs*, 158 U. S. 564 (1895). Laxity in law enforcement (federal, state, and local)—long a source of reproach, but aggravated by the difficulty of carrying out the statutes enacted in pursuance of the Eighteenth Amendment—led President Hoover, in 1929, to appoint a fact-finding commission on law observance and enforcement (George W. Wickersham, chairman). A portion of the commission's report, dealing with the enforcement of the prohibition amendment and laws, was made public early in 1931, and will be found in *U. S. Daily, Supp.*, Jan. 21, 1931.

The constitution also stipulates that the United States shall guarantee to every state a republican form of government, and shall protect the states against both invasion and domestic violence. If the republican form of government in a state is threatened or an invasion is undertaken, the president acts without awaiting a request from the state authorities. If the situation involves merely domestic disorder, he cannot act until he is asked to do so, unless the execution of national law or the safety of national property is imperiled; in this contingency, he may intervene independently, as did President Cleveland when, in 1894, the carrying of the mails and the flow of interstate commerce were obstructed by a great railway strike at Chicago.<sup>1</sup> A request for national assistance in repressing domestic violence is made by the legislature of the state if it is in session, otherwise by the governor. The president is not bound to comply; indeed he is not likely to do so unless, after investigation, he feels that the authorities of the state have reached the limit of their capacity to handle the situation. When first asked to aid West Virginia in curbing disorders produced in that state by protracted strikes of bituminous coal miners in 1921, President Harding refused, although later developments led him to take the desired action.

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Suppression of  
domestic  
disorder

Next, in this general connection, may be mentioned the president's power, as chief executive, to grant pardons and reprieves. The Supreme Court has said that the effect of a full pardon is to make the offender, in the eye of the law, "as innocent as if he had never committed the offense."<sup>2</sup> A reprieve is, of course, only a postponement of the execution of a sentence. In wielding the pardoning power, the president acts under two express constitutional limitations: he cannot pardon a person who has been convicted on impeachment and thus restore him to office; and he can grant a pardon only where the offense has been against the authority of the United States as distinguished from that of a state. Outside of these restrictions, the pardoning power is very ample. It may, indeed, be used in behalf of a stipulated class of persons,

2. Pardon  
and  
reprieve

<sup>1</sup> Governor Altgeld protested against the use of national troops in the state unless he or the legislature requested it. But the president stood firmly on his right and duty to execute the national laws with all the forces at his command, and his position was sustained by the unanimous judgment of the Supreme Court in the Debs case previously cited. See Cleveland's own account of the affair in his *Presidential Problems* (New York, 1904), Chap. II. Cf. W. R. Browne, *Altgeld of Illinois* (New York, 1924), Chaps. XII-XVI.

<sup>2</sup> It does not have the effect, however, of restoring property that has been forfeited or office that has been vacated.

rather than individuals specifically named, and thus may give rise to what is called an amnesty. But though Congress can itself pass acts of amnesty,<sup>1</sup> that body cannot in any way, by legislation, curtail the president's right to grant pardons at his own discretion. Pardons, therefore, may be full and unconditional, or they may be restricted in any manner that the president chooses.<sup>2</sup> As may be imagined, few of his powers bring a president more perplexities. He is provided by the Department of Justice with full information, and with opinions, on each case that comes up. But he alone makes the decision, and in doing so he must be prepared, in the interest of the public well-being, to withstand touching appeals and powerful influences.<sup>3</sup>

3. Appoint-  
ment and  
removal

Restrictions:

(a) Advice  
and  
consent  
of the  
Senate

Outside of the members of Congress, only two officials connected with the national government are elected, namely, the president and the vice-president.<sup>4</sup> All others are appointed. The power to appoint is vested basically in the president; and no monarch or minister in any foreign land—unless perhaps certain European dictators—has more actual control over the filling of public offices. His power in this domain is, nevertheless, restricted in a number of important ways. In the first place, by constitutional provision, he appoints, not independently, but “by and with the advice and consent of the Senate;” to speak more strictly, he *nominates*, and the Senate confirms, by a majority vote of the members present. As was explained by Hamilton in *The Federalist*, this arrangement was adopted, not in order to relieve the president of responsibility for appointments, but to check any spirit of favoritism that he might display and to prevent the appointment of “unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity.”<sup>5</sup>

It long ago became customary for the Senate to endorse, almost as a matter of course, the president's selections for the highest positions in the executive departments. The heads of departments

<sup>1</sup> Brown v. Walker, 161 U. S. 591 (1896).

<sup>2</sup> A person serving a sentence in a federal prison may also be paroled, without pardon; or his sentence may be commuted, *e.g.*, from death to life imprisonment, or from imprisonment to fine. See *Biddle v. Perovich*, 274 U. S. 480 (1927), and *Ex parte Grossman*, 267 U. S. 87 (1925).

<sup>3</sup> W. H. Taft, *Our Chief Magistrate and his Powers*, 118-124. An exceptionally notable pardon was that of Eugene V. Debs by President Harding in December, 1921.

<sup>4</sup> Accuracy requires it to be noted, however, that each house of Congress chooses its own officers, except that the vice-president of the United States is *ex-officio* president of the Senate.

<sup>5</sup> No. LXXXVI (Lodge's ed., 474).

serve as his principal official advisers; besides, as the chief of the executive branch, he bears full responsibility for their administrative acts. On both grounds, it is only fair that in choosing them he shall have rather complete freedom.<sup>1</sup> Nominations to judgeships and diplomatic positions have been rejected—or at all events strongly opposed—with somewhat increased frequency of late, yet as a rule are not seriously challenged. In other fields, the power to confirm or reject is employed freely, and the president must be prepared, in case one nominee fails, to offer another or to see the office in question stand vacant for a time. The number of senatorial rejections naturally varies with circumstances. If the president and Senate are on good terms, and especially if the president's party boasts a loyal senatorial majority, nominations are likely to be approved almost automatically. If, however, there is lack of harmony, rejections or refusals to act will be relatively numerous.<sup>2</sup>

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In any case, much deference is paid the long-established custom known as "senatorial courtesy." Nominees have commonly been brought to the president's attention and their claims advocated, or they have been opposed in favor of other candidates, by one or both of the senators from their state, and under the rule of courtesy the Senate almost invariably confirms or rejects according to the wishes of the member or members immediately interested. If the president sends in the name of a resident of Cleveland to be collector of internal revenue in his district, the Senate will normally confirm if the nominee is satisfactory to the senator or senators from Ohio, and otherwise will reject—unless, of course, these senators are not of the party to which the president belongs, or, though nominally of the party, are at outs with him on matters

"Senatorial  
courtesy"

<sup>1</sup> There have been only six instances of senatorial rejection of nominees for department headships. The most recent was the rejection of Charles B. Warren for the post of attorney-general in March, 1925. In the winter of 1928-29, however, confirmation of Roy O. West as secretary of the interior stirred a lively fight (*Amer. Yr. Bk.*, 1928, p. 16). After the inauguration of President Hoover, there was heated opposition to the continuance of Andrew W. Mellon as secretary of the treasury, and the president's constitutional right to continue him and one other department head without sending their nominations to the Senate was challenged. Under a ruling of the attorney-general, the president's course was sustained; indeed, it was shown that there were fully a hundred precedents for it. For majority and minority reports on the question by the Senate committee on the judiciary, see 71st Cong., 1st Sess., Senate Report No. 7 (1929).

<sup>2</sup> During a recess of the Senate, the president may make temporary appointments to positions requiring confirmation. These lapse at the end of the Senate's next session unless confirmed, although there is nothing except considerations of expediency to prevent reappointment of the same man the moment the Senate adjourns.

of policy. In these latter cases, the president will look elsewhere than to the senators for proposals of candidates,<sup>1</sup> and his supporters in the upper house will try to see that his nominations are confirmed regardless of the attitude of such senators.

A second limitation upon the president's power of appointment arises from authority given Congress by the constitution to vest the appointment of such "inferior officers" as it thinks proper, not only in the president alone, but in the courts of law, or in the heads of departments.<sup>2</sup> The constitution nowhere defines the term "officer," nor does it say who are to be considered "inferior officers;" and no very clear delimitations have established themselves in practice. About all that can be said is that the constitution requires certain kinds of officers—ambassadors, other public ministers and consuls, and judges of the Supreme Court—to be appointed by the president and Senate, and that outside of this small group it is for Congress to say who are "inferior officers" and to provide, if it likes, for appointment of them by any one of the three special agencies named. This power has been exercised repeatedly: the president has been given sole control of certain appointments, *e.g.*, the librarian of Congress; the courts have been authorized to select their own clerks; and the heads of departments have been empowered to choose great numbers of subordinates. How far this dispersion of the appointing power has gone is indicated by the fact that, in a total of 608,915 officers and employees in the national executive and administrative service,<sup>3</sup> only about 17,000 are nowadays put in their positions by action of the president and Senate. Heads of departments, assistant secretaries, many bureau chiefs, members of such independent establishments as the Interstate Commerce Commission and the Federal Trade Commission, postmasters in larger cities, collectors of customs and internal revenue, superintendents of the mints—all of these, with some other groups, are still "presidential" offices; and some of them are clearly not "inferior," in any ordinary sense of the word. Nevertheless, the term is very flexible, and nothing except considerations of property and expediency prevents Congress from transferring the appointment of any of the officers named—even the heads of departments—from the president and Senate to some other appointing authority recognized by the constitution.

<sup>1</sup> *E.g.*, to members of the state's delegation in the lower house, to the state's representative on the national committee of the president's party, etc.

<sup>2</sup> Art. II, § 2, cl. 2.

<sup>3</sup> June 30, 1930.

In making appointments, the president is further limited by certain practical conditions. The utter impossibility of personally knowing the qualifications of most of the candidates considered forces him to rely on other people for information and guidance; indeed, in most appointments the initiative is taken by a senator or representative rather than by the president himself.<sup>1</sup> Appointments are often virtually dictated, too, by the necessity of conciliating a wing of the party, or meeting a demand of a particular section of the country. And by no means the least important limiting condition is the difficulty of finding men who will accept arduous and responsible positions at the meager salaries which in many instances prevail.

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(c) Other  
limiting  
conditions

The constitution makes all civil officers of the United States liable to removal by impeachment, but only upon conviction of treason, bribery, or other high crimes and misdemeanors. Obviously, there must be removals for incompetency, neglect, and other reasons which have no relation to the specified grounds for impeachment, and the question of how such removals should be made forced itself upon the attention of Congress almost immediately after the new government under the constitution was set up. Two opposing views appeared. One was that, in the absence of any provision in the constitution, the power to remove should be implied from the power to appoint, and should be exercised by the same authorities that made appointments, *i.e.*, in many cases the president and Senate. Alexander Hamilton was strongly of this opinion. The other view was that if the president was required to obtain the consent of the Senate to removals, the resulting refusals and delays would seriously impair the efficiency of the service, and that, therefore, the president ought to be in a position to remove officials by his own independent action. Madison argued convincingly for this view, and it finally prevailed.

Removals

In 1867, Congress, actuated by hostility to President Johnson, passed over his veto a tenure of office act which provided that, while the president might suspend a civil officer when the Senate was not in session and accordingly could not act on the case, he should definitely remove no such officer except with the consent of that body.<sup>2</sup> This measure, however, was partly repealed in 1869, and was rescinded altogether in 1887; and it has long been gen-

No senatorial restriction

<sup>1</sup> W. H. Taft, *Four Aspects of Civic Duty*, 98.

<sup>2</sup> This applied, of course, only to officers appointed with the advice and consent of the Senate.

erally conceded that Johnson was correct in his view that it was unconstitutional.<sup>1</sup> The president cannot remove judges, who hold office during good behavior and are removable only by impeachment; and he may remove officials who secure appointment under the merit system only "for such causes as will promote the efficiency of the service."<sup>2</sup> But otherwise he can remove any civil officer of the United States at any time, for any reason, and without giving any explanation; and this is no less true of officers appointed for the customary four-year term prescribed by various tenure of office acts, *e. g.*, of 1820 and 1836, than of those whose tenure is indefinite.

Such was the ruling of the Supreme Court in the case of *Parsons v. United States*, decided in 1890.<sup>3</sup> Even after this decision, however, some doubt remained as to whether the president's power to remove officers whom he had appointed with the consent of the Senate could in any way be restricted by Congress. Answer to this query was supplied in 1926 in one of the most important Supreme Court decisions in recent years.<sup>4</sup> A statute passed in 1876, and still in force, provides that "postmasters of the first, second, and third classes shall be appointed and may be removed by the president by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." In 1920, President Wilson, without consulting the Senate, removed Frank S. Myers, first-class postmaster at Portland, Oregon, whom he had appointed in 1917. In every way open to him at the time, Myers protested against his displacement; and when the four-year period for which he had been appointed expired, he sued in the Court of Claims for the salary of which his removal had deprived him. Without touching the constitutional question, the Court of Claims gave judgment against the plaintiff on the ground of undue delay in suing; whereupon the case was appealed to the Supreme Court. The question was whether the act of 1876—which had been palpably violated in Myers' removal—was valid; and for the first time in history the government,

<sup>1</sup> During the period while it was in force, the statute never came before the courts in such a way as to lead to a decision upon its validity. But the Supreme Court later intimated strongly that it was unconstitutional, and in the Myers case in 1926 (to be described presently) it definitely so declared.

<sup>2</sup> See p. 392 below. This restricting clause is so elastic that, in practice, it is possible for the president to bring about the removal of almost any merit appointee.

<sup>3</sup> 167 U. S. 324.

<sup>4</sup> *Myers v. United States*, 272 U. S. 52.

through the Department of Justice, appeared in the Supreme Court to attack the constitutionality of an act of Congress. In a six-to-three decision, based partly on the historical "decision of 1789" and partly on the inferential argument that the removal power is part of the president's broad grant of executive authority which under the doctrine of separation of powers cannot be abridged by Congress, the Court held the statute of 1876 unconstitutional in so far as it attempted to place restriction upon the power of the president to remove officers appointed by him with the consent of the Senate. The opinions rendered by the three dissenting justices were weighty; some constitutional lawyers regard them as superior to the majority opinion, both in historical accuracy and in logic. Be that as it may, the question—curiously left unsettled for one hundred and thirty-seven years—is now to be deemed closed; the removal of Myers was constitutionally and legally proper, and (unless the Supreme Court changes its mind) no action by Congress can in future operate to restrain the president from any removal of the kind which seems to him desirable. Whether his power to remove an officer appointed by him alone is similarly beyond the competence of Congress to curtail is not settled, although the reasoning of the Court seems broad enough to apply equally to this type of appointment.<sup>1</sup>

The effect of the decision is thus to give the president full rein in the matter of removals. Except in the case of judges, "he may retire every presidential appointee to private life at a stroke of the pen. He can be as capricious as he chooses to be." Little wonder that the decision provoked speculation as to probable consequences! The view of the best students of the subject, however—and it has thus far been borne out by experience—was that matters would go on very much as in the past. The customary method of making removals had been by nominating successors whose confirmation by the Senate served at one stroke to meet the requirement that the Senate be consulted and to remove the incumbent.

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Effects of  
the Myers  
decision

<sup>1</sup> R. E. Cushman, "Constitutional Law in 1926-1927," *Amer. Polit. Sci. Rev.*, XXII, 70-77 (Feb., 1928); E. S. Corwin, "Tenure of Office and the Removal Power under the Constitution," *Columbia Law Rev.*, XXVII, 353-399 (Apr., 1927); H. L. McBain, "Consequences of the President's Unlimited Power of Removal," *Polit. Sci. Quar.*, XLI, 596-603 (Dec., 1926); T. R. Powell, "Spinning Out the Executive Power," *New Republic*, XLVIII, 369-371 (Nov. 17, 1926); J. Hart, "The Bearing of *Myers v. U. S.* upon the Independence of Federal Administrative Tribunals," *Amer. Polit. Sci. Rev.*, XXIII, 657-673 (Aug., 1929), and reply by A. Langeluttig, *ibid.*, XXIV, 57-66 (Feb., 1930). The briefs, oral arguments of counsel, and opinions of the Court in the Myers case will be found in 69th Cong., 2nd Sess., Senate Doc. No. 174 (1926).



It was chiefly the fact that President Wilson departed from usage in the Myers case by nominating no successor that left the Senate unconsulted and prompted Myers to bring his suit. Hereafter, the president will be free to follow this course with impunity—so far as sheer legality is concerned. Normally, however, there must be a successor; that successor must be confirmed; and political expediency will dictate that the old procedure be adhered to. Presidents cannot afford to be guided by caprice, or to ruffle the feelings of senators unnecessarily. Full responsibility for removal is concentrated in the president, as it ought to be; but political expediency and public opinion may reasonably be depended upon to prevent abuses for which the constitution, as now interpreted, undeniably leaves the way open.<sup>1</sup>

Quite as important as the president's authority to appoint and remove officials is his power to direct them in performing their duties. As exercised to-day, this power is the outcome of long and somewhat hazardous development. The idea of the architects of our national governmental system was that the control of executive and administrative work should be divided between the president and Congress; and when the first executive departments were established it was specified that the former should have power to direct two of them, *i.e.*, State and War, but that the head of the

<sup>1</sup> If the Senate cannot legally prevent a removal, it also cannot compel one. This principle—never really doubted by any constitutional lawyer—received forceful illustration in February, 1924, when, by a vote of 47 to 34, the Senate called upon President Coolidge to ask for the resignation of the secretary of the navy, on the ground that the latter had been remiss in the performance of his official duties. Affirming that "the dismissal of an officer of the government, such as is involved in this case, other than by impeachment, is exclusively an executive function," the president explained in a public statement that no official recognition could be given the resolution; and legal opinion and popular sentiment alike strongly supported the position taken.

Another angle of the relations of president and Senate in the matter of appointments and removals was presented early in 1931, when the Senate, after confirming three persons nominated by the president for membership in the reorganized Federal Power Commission (see p. 609 below), changed its mind and by a vote of 44 to 37 attempted to recall the confirmations. President Hoover took the position that the confirmations represented completed acts, that the commissioners were duly in office, and that the only way—aside from removal by the president—in which they could be ousted was by impeachment. For the president's vigorous statement, see *New York Times*, Jan. 11, 1931, §1, p. 2. Although it was widely believed that the president's position was constitutionally correct, the Senate adopted a resolution to institute quo warranto proceedings to ascertain whether one of the three commissioners, Mr. George Otis Smith (who had been designated chairman of the Commission) was legally in office. The matter was pending when this book was printed (March, 1931), and was expected to be taken to the Supreme Court for final decision.

The principal works on the president's appointing and removing power are those of E. S. Corwin, C. E. Morganston, and J. Hart, cited in the bibliographical list at the end of the present chapter.

third, *i.e.*, the Treasury, should report directly to Congress. The earlier presidents used their directing power sparingly, and the courts viewed it as practically limited to the fields in which it was specifically conferred.

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There is no denying that Congress exercises basic control over the executive authorities to-day, and especially over the subordinate administrative system. It is Congress that creates the executive departments and their more important subdivisions and determines what their functions shall be. It is Congress that says, in many situations, what shall be done and—in so far as it likes—how it shall be done. Congress alone can provide the requisite funds, and it can investigate, criticize, and suspend or permanently stop many, if not most, kinds of administrative activity, regardless of the wishes of the president and his advisers.<sup>1</sup> Nevertheless, it is the president—personally or through his principal executive co-workers—that exercises immediate direction and control; and Congress itself has contributed most effectively to building up the existing vast power of executive direction by providing new governmental machinery to be operated by the president, and by assigning all manner of directive duties and tasks to him.

Division  
of control  
over  
adminis-  
tration

In point of fact, the directing power is one which must have developed on large lines in any case. To begin with, the power to remove involves the power to direct. This was clearly illustrated when President Jackson ordered the deposits of government funds in the United States Bank to be withdrawn, and ousted two secretaries of the treasury before obtaining one who would give the necessary instructions.<sup>2</sup> Armed with the power of removal, he could reiterate his command any number of times, until some one was found to obey it. In the second place, however, the power of direction has a clear constitutional basis. The constitution makes it the duty of the president to “take care that the laws be faithfully executed,”<sup>3</sup> and requires him, at his inauguration, to take oath that he will “faithfully execute” the office of president and preserve, protect, and defend the constitution. His foremost duty, indeed, is to see that the laws are enforced—not only the acts of Congress, but treaties, decisions of the federal courts, and all obligations which can be inferred from the constitution; and to this end he must be regarded as endowed with power to direct his subordinates

Basis and  
extent  
of the  
president's  
power of  
direction

<sup>1</sup> See p. 312 below.

<sup>2</sup> W. MacDonald, *Jacksonian Democracy*, Chap. XIII.

<sup>3</sup> Art. II, § 3.

in the executive service, even as he is authorized to use the armed forces if such a course becomes necessary. Acts which are by law required of heads of departments and other executive officers, *i.e.*, acts which are "ministerial" rather than political, are, indeed, theoretically beyond the president's power to control. In case of neglect, there are recognized judicial processes to compel performance of them. Nevertheless, even here the president may assert himself; he may, in fact, go so far as to threaten removal of an officer for performing an act required of him by Congress, thereby forcing upon him the disagreeable choice between a legal prosecution and the loss of his position.

Closely related to the power of direction is the ordinance power. The nature and scope of the government's multifarious activities are defined, at least broadly, in the constitution and in acts of Congress, but the details of organization, the forms of procedure, and, in general, the *minutiae* of administration, are left to be prescribed by supplementary rules and regulations. Thus, an immigration law, in seeking to debar paupers and criminals from admission to the country, may specify rather fully the means and manner by which it is to be enforced; yet it will remain for the executive branch of the government to lay down many detailed regulations pertaining to the work of inspection, the handling of appeals from the decisions of the examining authorities, the detention of applicants refused admission, and similar matters. Most of this subordinate legislation emanates from the heads of departments, or even from their inferiors. But a considerable amount comes from the president, who, in addition, is, of course, ultimately responsible for all ordinances issued in the departments. The president himself promulgates the Consular Regulations, the Civil Service Rules, and the Army and Navy Regulations, together with rules for the patent office and the customs and internal revenue services. In some cases, he acts upon express statutory authority; in others, his authority is implied from the nature or tone of the law to be executed; in still others, he proceeds under sole warrant of the constitution. The Army and Navy Regulations, for example, were long promulgated by virtue of the president's constitutional status as commander-in-chief, although nowadays they have also a statutory basis. The ordinance power is not as extensive in the United States as in countries of Continental Europe, or even in Great Britain, where the remarkable growth of "administrative," or "subordinate," legislation in recent years

has stirred a great amount of controversy.<sup>1</sup> Our underlying principle of separation of powers places some limit on the extent to which ordinances that are in effect laws can be issued by the president and his subordinates, and especially upon the freedom of Congress to delegate law-making authority to the executive officials. Nevertheless, ways of evading the principle have been found; the presidential ordinance power grows apace as the range of governmental activities increases; and under the stress of the World War it attained truly astonishing proportions, including, among other things, the power to control the transportation and distribution of foodstuffs, to fix prices, to declare embargoes, to fix priority of shipments, and to redistribute and regroup the administrative bureaus.<sup>2</sup>

From the president's general power of direction, through guidance of individual officers and through the making of blanket rules and regulations, we turn to a directing power of a very special sort, *i.e.*, the management of foreign relations. It is true that the president is not vested with sole authority in this important domain. The Senate has a very effective check upon his treaty-making activities; he cannot declare war, even though his acts may make war inevitable; and when money is needed, it is obtainable only by vote of both branches of Congress. Notwithstanding, however, that there are many things that he cannot do independently, the president, acting directly and personally or through the instrumentality of the State Department and Foreign Service (both under his immediate control), is the basic agency through which our public dealings with all other states of the world are initiated and carried on.<sup>3</sup>

As would be expected, this rôle imposes on him a wide variety of responsibilities and activities. In the first place, he is the official medium of intercourse between our government and all foreign governments. He speaks for the nation on ceremonial occasions and receives distinguished visitors to our shores. Subject to the Senate's right of confirmation, he appoints all of our ambassadors and

<sup>1</sup> F. A. Ogg, *English Government and Politics*, 200-205; J. A. Fairlie, *Administrative Procedure in Connection with Statutory Rules and Orders in Great Britain* (Urbana, 1927).

<sup>2</sup> On the ordinance power, see the works of J. Hart and H. C. Black, cited in the reference list at the end of this chapter.

<sup>3</sup> There would be some advantage in treating the president as manager of foreign relations, the State Department, and the Foreign Service in a single chapter. To do so, however, would impair the essential unity of both the present chapter and Chap. xvii. Pages 281-292 of this chapter and 330-340 of the later one may easily be read together if preferred.

ministers to other countries, and all consuls stationed therein.<sup>1</sup> On his sole responsibility, he receives foreign ambassadors and other public ministers, and also, if necessary, dismisses them. Through the State Department, he carries on correspondence abroad, obtaining information, declaring policy, pressing claims, offering settlements, and replying to all manner of inquiries and proposals.

(b) Recognition

Out of this function of representing the nation in its dealings abroad grows a second very important power, namely, that of recognition—by which is meant the authority to determine what the official American attitude shall be toward an unsettled or changed political situation in a foreign land. An insurrection may have arisen, and the president may recognize the insurgency, or even the belligerency, of the insurrectionists, thereby according them (so far as the United States is concerned) certain rights which they would not have as mere rebels.<sup>2</sup> An example is President Cleveland's recognition of a state of insurgency in Cuba in 1895. But he may go farther: by proclamation, or by sending or receiving a diplomatic representative, he may recognize the independence of an insurrectionary state, even at the risk of bringing on a war between the United States and the state which has been dismembered. Thus President Monroe recognized several of the revolutionary Latin American republics;<sup>3</sup> thus President Roosevelt, by receiving the emissary of the embryo republic of Panama in 1903, recognized Panama as an independent state and paved the way for the agreement under which the Panama Canal was built;<sup>4</sup> thus also were Czechoslovakia and other European "succession" states recognized in 1918 and 1919. The general principle is that the president may go as far as he likes in recognizing international facts. Premature recognition, before the fact exists, amounts, however, to intervention, and may easily become a cause of war. Fur-

<sup>1</sup> Indeed, the president can employ special agents abroad without procuring senatorial consent at all. Technically, such agents are not officers of the United States, and they can be paid only out of the president's contingent fund, unless Congress makes special appropriation for them. But their services may be quite as important as those of ministers and ambassadors, as, for example, were those of Col. E. M. House as special emissary of President Wilson in Europe during the World War. See H. M. Wriston, *Executive Agents in American Foreign Relations* (Baltimore, 1929).

<sup>2</sup> A. S. Hershey, *Essentials of International Public Law and Organization* (New York, 1927), 201-207.

<sup>3</sup> Congress appropriated one hundred thousand dollars for diplomatic posts in Latin America, but admitted the president's full right to determine what countries should be recognized. J. Q. Adams, *Memoirs*, IV, 205-206.

<sup>4</sup> *Foreign Relations of the United States* (1903), 245.

ther, the president may determine which of two or more rival governments in a country he will have dealings with—to which, for example, he will accredit, or from which he will receive, a diplomatic or consular representative. He may, of course, withhold recognition altogether, and in that way may profoundly influence the course of events in the country concerned. The downfall of the revolutionary president, Huerta, in Mexico, in 1914, was caused almost entirely by President Wilson's refusal to recognize him as the *de facto* chief executive. The constitution says nothing about recognition, and at various times it has been argued that Congress possesses the power concurrently with the president. International usage, however, indicates that it is strictly an executive function; as such, it is easily inferable from the power to appoint and receive envoys; and precedent, backed by judicial opinion, places it wholly in the president's hands, subject only to the power of the Senate to confirm diplomatic appointments.<sup>1</sup>

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"Under our system of government," the courts have declared, "the citizen abroad is as much entitled to protection as the citizen at home;"<sup>2</sup> and it falls to the president, as chief executive and director of our foreign relations, to see that such protection is duly extended. If an American sojourning in a foreign land or traveling on the high seas is maltreated and cannot obtain justice, the president, acting through a diplomatic representative, or even directly, may make demands in his behalf, and may go to any lengths short of a declaration of war to obtain redress for him.<sup>3</sup> Similarly, it is the president's duty to extend protection to foreigners temporarily domiciled in the United States. This does not necessarily mean that he must do more in their behalf than execute

(c) Protection of  
citizens  
abroad

<sup>1</sup> E. S. Corwin, *The President's Control of Foreign Relations*, 71-83; J. M. Mathews, *American Foreign Relations: Conduct and Policies*, Chap. xviii; W. L. Penfield, "The Recognition of a New State—Is it an Executive Function?," *Amer. Law Rev.*, XXXII, 390-408 (May-June, 1898); C. A. Berdahl, "The Power of Recognition," *Amer. Jour. Internat. Law*, XIV, 519-539 (Oct., 1920); J. Goebel, "The Recognition Policy of the United States," *Columbia Univ. Studies in Hist., Econ., and Public Law*, LXVI, No. 1 (1915). An address by H. L. Stimson entitled "The United States and the Other American Republics" (Washington, Govt. Printing Office, 1931) is a recent official statement of our recognition policy.

<sup>2</sup> *Durand v. Hollins*, Fed. Cas. No. 4186 (1860).

<sup>3</sup> E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (new ed., New York, 1927); "The Powers of the President as Commander-in-Chief in Relation to the Protection of Nationals Abroad," *Foreign Policy Information Service*, IV, No. 10 (July 20, 1928). It is hardly necessary to add that the treaty-making power is used freely in obtaining recognition of and protection for citizen rights abroad—even to the extent, in times past, of conferring the benefits of extraterritorial jurisdiction in non-Christian and more or less backward countries like Turkey, Persia, and China.

the constitution and the laws of Congress touching their rights—which, of course, he is bound to do in any case. But he may specially request the authorities of a state to be mindful of alien rights; he may instruct a district attorney to give legal aid; and in time of war he may enlighten both aliens and citizens by a proclamation of neutrality calling attention to rules of international law and to statutes forbidding various unneutral acts.

(d) Treaty-  
making

The most important presidential powers in relation to foreign affairs remain to be considered, *i.e.*, (1) the making of treaties and executive agreements, and (2), as a closely related matter, the shaping of foreign policy. Under the Articles of Confederation, treaties were made by Congress; and until the work of the Philadelphia convention reached its later stages, it was expected that the function—conceived of as essentially legislative—would be assigned exclusively to the Senate. As, however, the concept of the presidency broadened and grew, the thought developed that treaty-making, along with the general conduct of the country's foreign relations, should be placed, rather, in the hands of the chief executive—with coöperation of, and check by, the Senate. A proposal that the House of Representatives be admitted to a share in the work was rejected, principally on the ground that the requisite "secrecy and dispatch" could be expected only of the smaller upper house; and accordingly the provision of the new constitution came to be that the president should have power to make treaties, "by and with the advice and consent of the Senate . . . provided two-thirds of the senators present concur."<sup>1</sup> The two-thirds rule was adopted because it was believed that treaty-making—especially for a young nation situated as was the United States—is a hazardous business and ought to be closely guarded, and also as a means of protecting various sectional interests, such as New England's stake in the fisheries, from being sold out or sacrificed by simple majorities. John Jay expressed the fear that two-thirds of the senators would tyrannize over the remaining third; but, as we shall see, the chief complaint nowadays is that, under the operation of Senate rules, the one-third blocks the will of the two-thirds, as well as of the executive and the country.

Presi-  
dential  
initiative

Attempt is sometimes made to show that in the work of treaty-making the Senate is a full co-partner with the president.<sup>2</sup> The

<sup>1</sup> Art. II, § 2, cl. 2.

<sup>2</sup> See argument by Senator McKellar, July 8, 1930, in *Congressional Record*, 71st Cong., Special Sess. of Senate, pp. 33-34.

language of the constitution, however, forbids such a view. The Senate has no official contact with foreign governments; it can only assent or disagree to ratification of a treaty after the agreement has become a perfected instrument. The farthest that it can go is to assent on certain conditions, or to attach reservations which will make it necessary for the president to renew negotiations with a view to securing the foreign government's acceptance of the changes proposed. Treaties become perfected instruments, and reach the Senate as such, exclusively on presidential initiative and by presidential direction.

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Either house of Congress, or the two houses concurrently, may by means of a resolution advise that a certain treaty be negotiated. But unless the president chooses to set the necessary machinery in motion, nothing can be done. Conversely, he can start a negotiation regardless of the feeling in either branch of Congress concerning it, or even without any knowledge on the part of Congress; and he need make no disclosures regarding it until he is ready to do so. He may work through the regular diplomatic representative accredited to the foreign government concerned; or he may appoint a special plenipotentiary or commission to go abroad for the purpose; or again, he may cause the negotiation to be carried on at Washington through the secretary of state. When the treaty is completed, he, furthermore, has the full option of submitting it to the Senate, returning it to the negotiators for revision, or dropping it and terminating all effort in connection with it. He may hold back the instrument because he considers it unsatisfactory, or because he recognizes that submission of it to the Senate would be useless.

The president may, of course, consult the Senate as a whole, or individual senators, in advance or during the course of a negotiation. Washington and Jackson sought the Senate's opinion on the terms of certain Indian treaties about to be made; and Polk, in 1846, similarly solicited advice on a proposed convention with Great Britain for the settlement of the Oregon boundary. But though it was clearly the intention of the makers of the constitution that this should be the regular practice, the procedure broke down the first time it was tried,<sup>1</sup> and, all told, not more than a dozen instances of such advance consultation are on record. The president, it is true, usually finds it expedient to consult with the

Optional  
consulta-  
tion of the  
Senate

<sup>1</sup> For the circumstances, see D. F. Fleming, *The Treaty Veto of the American Senate* (New York, 1930), 16-21.



members of the Senate committee on foreign relations when a negotiation is in progress, or even to appoint senators to be members of negotiating commissions.<sup>1</sup> But with rare exceptions, the Senate as a whole is given no opportunity to express itself on a proposed treaty until the completed instrument is transmitted to it; senators, as a writer has recently remarked, are still trying to find a way to give "advice" in treaty-making as well as "consent."<sup>2</sup>

"A treaty entering the Senate," wrote John Hay after six years of experience as secretary of state, "is like a bull going into the arena; no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive."<sup>3</sup> This statement is much too strong, as is evidenced by two or three major facts: (1) that no treaty was rejected outright by the Senate until 1824; (2) that the total number so rejected in the entire history of the country (to 1930) is apparently only thirty; and (3) that while the Senate has insisted on amendments or reservations to some one hundred and fifty treaties, it has unconditionally approved more than five-sixths of the entire number presented to it.<sup>4</sup> Every proposed treaty, however, has to run the

<sup>1</sup> Three of the five commissioners appointed by President McKinley to negotiate a treaty of peace with Spain in 1898 were senators, one of them being chairman of the foreign relations committee. Two of the four commissioners who signed, on behalf of the United States, the treaty concluded with Great Britain, France, and Japan at the Washington conference on the limitation of armaments in 1921-22 were senators, one of them again being the chairman of the foreign relations committee. And two of the five commissioners who signed the London Naval Treaty of 1930 were members of the upper house. President Wilson was widely criticized because he did not include one or two senators in the commission which represented the United States in negotiating the treaty of Versailles in 1919; and the outcome showed that he at least could not have lost anything by doing so. On the other hand, it should be noted that the plan of including senators in commissions to negotiate treaties has been opposed vigorously, both in the Senate and outside, on the ground that it puts the senatorial members in the position of helping formulate proposals which they are expected to pass upon later as members of a separate branch of the government. D. F. Fleming, *op. cit.*, 27-32.

<sup>2</sup> D. F. Fleming, "The Advice of the Senate in Treaty-making," *Curr. Hist.*, XXXII, 1090 (Sept., 1930).

<sup>3</sup> W. R. Thayer, *Life and Letters of John Hay* (Boston, 1920), II, 393. Alluding to the necessity under which a foreign power finds itself of dealing first with the State Department at one end of Pennsylvania Avenue and then with "another State Department at the other end," Mr. Walter Lippmann has remarked that "a diplomatic affair with the United States is like a two-volume novel in which the hero marries the heroine at the end of the first volume and divorces her triumphantly at the end of the second." *For. Affairs*, IV, 218-219 (Jan., 1926).

<sup>4</sup> D. F. Fleming, *The Treaty Veto of the American Senate*, 50. In a recent period of less than six years (Dec., 1924, to Aug., 1930), the Senate assented to the ratification of one hundred and six treaties, with forty-one different nations.

gauntlet of senatorial scrutiny; and it must be conceded that most of the treaties that have failed at this stage, *e.g.*, the treaty for the annexation of Texas in 1844, the Olney-Pauncefote arbitration treaty with Great Britain in 1897, the Taft-Knox arbitration treaties of 1911, and the treaty of Versailles in 1920, have been instruments of major importance, and, further, that a good many significant treaties that finally emerge triumphant do so only after a great parliamentary battle, in which all possible favoring influence is brought to bear from the White House. Formerly, treaties were almost invariably considered in executive session behind closed doors, although some, *e.g.*, the Taft-Knox arbitration treaties of 1911, were debated with both press and public present. A new rule of 1929 put an end to private sessions except as ordered otherwise in individual instances by majority vote. In numerous cases, beginning with the Jay treaty in 1794, the Senate's consent to ratification has been qualified by reservations, amendments, and interpretations. These are usually tantamount to changes in the treaty, and if either the president or the foreign government is unwilling to accept the modifications involved, the treaty fails. A number of arbitration treaties were killed in this way in 1904, and others in 1911; likewise the protocol for adherence to the Permanent Court of International Justice in 1926. At any time while a treaty is pending in the Senate, the president can recall it, whether because circumstances have so changed that he no longer favors it or because he perceives that it is doomed to defeat. Even after the Senate has given its consent, a treaty may be held up. It remains for the president to ratify it; and, upon being apprised of ratification by the other government—or governments (for in these days of expanding world relations an increasing proportion of treaties are of the multilateral variety)—to promulgate it; and he has the option of refusing to take these final necessary steps, although naturally he will do so only under very unusual circumstances.

This plan of treaty-making, which gives the power of life and death to a minority in a legislative branch in which minorities can so easily prevent action from being taken, is unique.<sup>1</sup> Although, as democracy advances, there is a tendency in most countries to assimilate the conduct of foreign relations to the methods of controlling domestic affairs, and hence to assign larger powers to the legislature, parliaments are still rather generally disposed to leave

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Dissatisfaction with the existing system

<sup>1</sup> See pp. 468-472 below.

to the executive authorities their traditional freedom of action in foreign affairs. Many, though by no means all, treaties are submitted to parliament in Great Britain, France, and other states. In no case, however, except in the United States do treaties go before only a single house; and nowhere, with the same exception, is the assent of more than a simple majority required. The two-thirds rule in the United States had its origin in a period when (although objections were raised against it at the time) there was grave fear lest the young nation be embarrassed or endangered by treaties too easily made—when, indeed, it was not only thought desirable, but was found practicable, to enter only rarely into new treaty engagements. For a hundred years, the system served, on the whole, rather acceptably. In later days, however, it grew less satisfactory, and, as every one knows, it is at the present time criticized widely, sharply, and no doubt justly. The principal objections to it may be stated as follows: (1.) The two-thirds rule, though not inappropriate under eighteenth-century conditions, is out of harmony with our present-day democracy, grounded as it is upon the principle of government by simple majority. (2.) Inasmuch as a very large proportion of senators are elected by predominantly rural populations in thinly peopled agricultural states, the great weight assigned to the Senate in treaty-making gives too much power in this particular domain to populations remote from the coasts and more or less provincial in their outlook.<sup>1</sup> (3.) From the forward-looking point of view in international affairs, the Senate—or a controlling minority thereof—seems clearly to have cut off the United States from a leadership for which she was strategically placed, and to have relegated her to an unenviable position in the eyes of the world—many well-informed people, including good Americans, regarding the second chamber at Washington as the greatest present obstacle to the advancement of world peace. (4.) As matters stand, the House of Representatives is practically coerced into making appropriations or enacting other legislation required to give effect to numerous treaties, with the making and ratification of which that body has had nothing to do. On this ground, the House early set up a claim to a share in the treaty-making power. In his message on the Jay treaty in 1796, Washington, however, urged that after a treaty has been duly ratified, Congress is morally, if not legally, obligated to take whatever action is necessary to enable the commitments under it to be lived

<sup>1</sup> Cf. p. 418 below.

up to; and from thence to the present time this view has commonly prevailed.<sup>1</sup>

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Proposed  
changes

There are able authorities who believe that, on the whole, the existing system is satisfactory and ought to be preserved. But most people who have thought about the matter favor more or less drastic changes. Two plans seem most worth considering. The first would admit the House, as an appropriating body, and as perhaps the more truly representative chamber, to a share in the treaty power, on such a basis that assent to ratification would be by simple majority in the two houses, thus assimilating it to the process of ordinary legislation, except that the president would have, as now, exclusive initiative and also an absolute veto. Such a plan was advocated in 1787 by James Wilson and Roger Sherman, and is supported to-day by a long list of eminent publicists, political scientists, and others.<sup>2</sup> In operation, it would mean more delay in some instances, but, on the other hand, fewer deadlocks and certainly fewer cases of treaties being defeated by minorities; and—though this is perhaps not a vital matter—it would bring our method of handling treaties into line with that followed in practically all other countries in which treaties are submitted for parliamentary approval. The second main proposal is that the Senate continue to act alone as at present, except by simple majority instead of two-thirds—perhaps a simple majority of the full membership, which would mean that assent would require but forty-nine votes instead of the present sixty-four.<sup>3</sup> This plan also receives impressive support, although, when the alternatives are weighed carefully, the balance of advantage would seem to incline to the one first mentioned.<sup>4</sup> Somewhat of a movement is already under way to bring about a constitutional amendment providing for one change or the other. Inasmuch as, under the normal procedure, the Senate must itself give any proposal a two-thirds vote, the outlook for reform may not seem promising. Several members of

<sup>1</sup> I. M. Stone, "The House of Representatives and the Treaty-making Power," *Ky. Law Jour.*, XVII, 216-257 (Mar., 1929).

<sup>2</sup> For example, John W. Davis, George W. Wickersham, William Jennings Bryan, Dr. James Brown Scott, and Professors H. L. McBain, Lindsay Rogers, James W. Garner, and Quincy Wright. See the last-mentioned writer's *The Control of American Foreign Relations* (New York, 1922), 368.

<sup>3</sup> See J. M. Mathews, *American Foreign Relations: Conduct and Policies* (New York, 1928), 429.

<sup>4</sup> A third plan, it may be noted, is to take the power to approve treaties away from the Senate entirely and give it to the House of Representatives. See S. W. McCall, "Again the Senate," *Atlantic Monthly*, CXXVI, 395-403 (Sept., 1920). This, however, is rather too drastic to deserve serious consideration.

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that body, however, are already on record in favor of a change; and hope for favorable action appears quite as well grounded as, for example, did predictions of a shift to popular election of senators a quarter of a century ago.<sup>1</sup>

Abroga-  
tion of  
treaties

Once promulgated, a treaty becomes part of the law of the land, enforceable like any other portion of that law. Not all treaties, however, are, or are intended to be, permanent. Some are terminated by war; some expire by limitation; some are superseded by other treaties; some are directly abrogated. Congress may pass resolutions "denouncing" a treaty, or specified sections thereof, and may even invalidate treaty provisions by enacting legislation inconsistent with them.<sup>2</sup> The final authority in bringing a treaty to an end is, however, the president, who may denounce it in conjunction with the Senate, or with both houses, or alone. President Taft, in 1911, terminated a long-standing treaty with Russia by independent denunciation.

Executive  
agreements

Treaties can become operative only with the advice and consent of the Senate. But not every understanding entered into with a foreign government takes the form of a treaty. Many, instead, are executive agreements.<sup>3</sup> In some cases, *e.g.*, postal conventions, these agreements rest upon a statutory basis. But the majority of them are concluded by the president, directly or through agents, on his sole authority—sometimes in pursuance of a treaty, sometimes as commander-in-chief, and occasionally by sheer exercise of executive power in its strict sense. And the limits to which he can go are nowhere defined. Many agreements deal with minor matters which, on their face, do not call for a treaty; for example, pecuniary claims of American citizens against foreign governments. But others relate to affairs of prime importance. The arrangement with Great Britain in 1817 for the limitation

<sup>1</sup> The relations of president and Senate in treaty-making are discussed at length in W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), I, Chaps. xxxiii-xxxvi; J. M. Mathews, *American Foreign Relations: Conduct and Policies*, Chaps. xx-xxi; Q. Wright, *The Control of American Foreign Relations*, Chaps. xiv, xviii-xix; and especially D. F. Fleming, *The Treaty Veto of the American Senate* (New York, 1930). On the textual and publication aspects of American treaties, see H. Miller, "Proposed New Edition of the Treaties of the United States," *Amer. Jour. of Internat. Law*, XXIV, 241-263 (Apr., 1930).

<sup>2</sup> The Supreme Court has held that treaties are in no fuller sense "supreme law of the land" than are laws made in pursuance of powers granted in the constitution. See *Chinese Exclusion Cases*, 130 U. S. 581 (1889).

<sup>3</sup> The term is not a happy one, because in a proper sense treaties themselves are executive agreements. In common usage it has, however, acquired the special meaning here given it.

of naval forces on the Great Lakes originated as an executive agreement, though in the following year it was given treaty basis. The Boxer indemnity agreement with China in 1901, the agreement with Panama in 1914 for enforcing the neutrality of the Panama Canal, the Lansing-Ishii agreement of 1917, and the armistice with Germany in 1918 are other illustrations.

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Indeed, an executive agreement may become frankly a means of evading—temporarily, at all events—the necessity of securing a treaty. In 1905, President Roosevelt worked out a treaty with Santo Domingo stipulating that the United States should guarantee the integrity of that republic and should take over the administration of the customs with a view to settling foreign claims and warding off European intervention. The Senate refused to consent to the treaty; whereupon the president entered into a *modus vivendi* with the Dominican government on exactly the lines desired; and for two years the protectorate was maintained on this sole basis.<sup>1</sup> In 1907, a treaty regularizing the arrangement was at last assented to and ratified. President Taft, in 1911, entered into a similar agreement with Nicaragua, which was superseded by a treaty only in 1916. So far as content goes, there is therefore no clear line of demarcation between executive agreements and treaties. There is a presumption that executive agreements which deal with large matters are preliminary to treaties. But this is not necessarily true; and, outside of the constitutional restriction that they cannot provide for outlays of money not authorized by Congress, and the further practical restriction arising from disinclination to incur senatorial or popular displeasure, there is really no limit to the extent to which the agreement-making power may be stretched.<sup>2</sup>

Though the shadow of the Senate falls athwart the entire domain of our foreign relations, it is, after all, more largely the president than any other authority that shapes our foreign policy. When a foreign complication arises, or a new international problem presents itself, he has the first opportunity to say what the

(e) Determination of foreign policy

<sup>1</sup> *Foreign Relations of U. S.* (1905), 334-343; T. Roosevelt, *Autobiography*, 551-552.

<sup>2</sup> Q. Wright, *The Conduct of American Foreign Relations*, 234-246. Promises may be made and understandings established, fully tantamount to agreements, without any knowledge on the part of either Congress or the public. A classic example is President Roosevelt's "gentleman's agreement" with Japan on Far Eastern policy at the close of the Russo-Japanese war, first brought to light a few years ago when the Roosevelt papers in the Library of Congress were explored. See T. Dennett, *Roosevelt and the Russo-Japanese War* (Garden City, 1925), 112.

attitude of the country shall be; and by the stand which he takes he can so put the nation on record as to make it next to impossible for Congress, or even a succeeding president, to assume a different position. Washington, by his proclamation of neutrality in 1793, practically determined once for all that the United States would hold aloof from the deadly struggle that had broken out between Great Britain and France. Monroe, in 1823, promulgated a set of principles concerning foreign political activities in the western hemisphere which, under the name of the Monroe Doctrine, broadened out into perhaps the most persistent and important—if also the most controversial and most misunderstood—of all our foreign policies. McKinley, through his secretary of state, John Hay, irrevocably committed the country in 1900 (and in a very real sense a number of other countries as well) to the principle of the “open door” in China. Roosevelt, Taft, and Wilson brought successive Caribbean republics under United States supervision, and, for better or for worse, left us a fairly definite policy of maintaining Latin American protectorates—with the result that American investors in Haiti, Santo Domingo, and Nicaragua look regularly, not to Congress, but to the president for action in their behalf. In all such matters, the president must sooner or later have the backing, if not of Congress, at least of public opinion; and it must be recalled, not only that Adams was balked in his Pan-American policy, Pierce in his Cuban policy, Grant in his Dominican policy, Cleveland in his Hawaiian policy, and Wilson in his endeavor to put the United States into the League of Nations, but that the war of 1812 and the intervention in Cuba in 1898 were forced upon reluctant presidents by zealous Congresses. Nevertheless, taking the history of the country as a whole, executive leadership has made the story of our foreign relations—both as to the things we have done and those we have not done—what it is. The president has unrestricted power of initiative; he can go far by his own authority; and it is usually found impossible to retrace the steps that he has taken. He may even lead the country into war; for, although he cannot declare war, he can adopt an attitude or create a situation, *e.g.*, by landing armed forces to protect United States citizens in a foreign country, that may make war unavoidable.<sup>1</sup>

<sup>1</sup> An interesting proposal which of late has received considerable support is that there be created a small confidential advisory board on foreign policy, to consist of such persons as ex-ambassadors, retired army and navy men, and representatives of large sectional or functional groups, and to be charged

This raises the general question of the president's war powers. By the terms of the constitution, he is commander-in-chief of the army and navy, and also of the militia of the several states when it is called into federal service. This alone would give him great military authority. But, in addition, he is required to see that the laws are faithfully executed, which may at any time entail the use of force; and it falls to him to act when it becomes necessary for the United States to discharge its constitutional obligation to protect the states against invasion or (on call) against domestic violence. Congress, it is true, shares generously in the war power. It creates the army and navy, fixes their size, determines the conditions of service, regulates the pay of officers and men, and votes all appropriations for equipment and maintenance. It makes rules for the regulation of both land and naval forces; and it alone can declare war. The president's actual control is, however, not seriously impaired by this division of authority. He appoints all the regular and reserve officers of the army and navy.<sup>1</sup> He supplements the general rules of Congress with detailed regulations. He has full power of direction over the war and navy departments, in which the money voted by Congress is spent. Limited only by the funds at his disposal, he can send both land and naval forces anywhere that he chooses, in this country or abroad, in time of war or in time of peace. He can wield as much authority as he likes in the planning and execution of campaigns, and there is nothing to prevent him from taking the field in person if he desires to do so. He can establish military governments in conquered territory, and directly, or through his appointed agents, exercise all executive power there, and all legislative power as well, until Congress makes other arrangements.<sup>2</sup> In short, Congress provides the money and the men; the president uses them almost completely at his own discretion.

Congress alone can declare war. But it is to be observed, first, that in the case of a civil war no declaration is necessary, and second, that, as has been said, the president may, by his own acts,

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6. War  
powers

Division  
of control  
with  
Congress

The  
president  
and the  
beginning  
of war

with a broad and continuous study of conditions and problems affecting our foreign relations (such as neither the president nor State Department officials have time to carry on), and with keeping the executive authorities in touch with public opinion in this field.

<sup>1</sup> The officers of the militia, except when it is in the service of the United States, are appointed as the several states direct. See p. 627 below.

<sup>2</sup> D. Y. Thomas, "History of Military Government in the Newly Acquired Territory of the United States," *Columbia Univ. Studies in Hist., Econ., and Public Law*, XX, No. 2 (1904).



make war inevitable. As commander-in-chief, President Polk, in 1846, ordered American troops to advance into territory which was in dispute with Mexico. The Mexican authorities had made it plain that such a step would be regarded as an act of war, and the soldiers were promptly fired upon. Polk then said that war existed by act of Mexico, and Congress proceeded to a formal declaration. President McKinley ordered the battleship *Maine* to Havana harbor in 1898, notwithstanding that the Spaniards were certain to regard the act as unfriendly. The vessel was blown up, and the Spanish-American war followed. War with Great Britain was narrowly averted in 1895 when President Cleveland, in a message to Congress, took a bold stand against the course of that power in the Venezuelan controversy. Had Colombia been a stronger state, war might well have been brought upon the United States by President Roosevelt's recognition of the republic of Panama in 1903. Had Germany or France joined Russia in her war with Japan in 1904-5, the United States would certainly have been drawn in on Japan's side if an extraordinary warning sent to those powers—and quite unknown, at the time, to either Congress or the country—had been made good. There will always be difference of opinion as to whether we were or were not at war with Mexico on the occasion of Admiral Mayo's capture of Vera Cruz by order of President Wilson in 1913,<sup>1</sup> and with Russia when—again on the president's sole authority—American troops coöperated in military expeditions against the Bolsheviks *via* Archangel and Vladivostok in 1918. But whatever may be the conclusion upon these points, there can be no doubt at all that by his handling of relations with Germany after the sinking of the *Lusitania* in 1915, President Wilson created a situation in which the only alternative to a declaration of war upon the German government was national stultification.<sup>2</sup>

The president is commander-in-chief in time of peace no less than in time of war.<sup>3</sup> The constitution does not define his functions in this capacity under either condition, nor has any court attempted to do so; but usage has made them fairly clear. In

Military  
powers in  
peace-time  
and in  
war-time

<sup>1</sup> F. A. Ogg, *National Progress*, 293-296. See S. E. Baldwin, "The Share of the President of the United States in a Declaration of War," *Amer. Jour. of Internat. Law*, XII, 1-14 (Jan., 1918).

<sup>2</sup> Over against this power of the president to "rush" Congress and the country into war must, however, be set his power to veto a declaration of war; although this power has never been, and is not likely to be, exercised.

<sup>3</sup> This has been questioned in Congress, but the contrary view has never established itself. See P. S. Reinsch, *Readings on American Federal Government*, 22-32.

time of peace, he appoints officers, makes regulations, and, in general, sees that the armed forces are so maintained as to be in readiness for quick and effective use; there is comparatively little to be done outside of ordinary administration. But in time of war, the situation is wholly different; the power of command then expands almost without limit, finding applications that would never be tolerated, or even thought of, save in a national emergency. The object in war is to break down the enemy's power of resistance as speedily as possible, and it becomes the president's supreme duty to take such measures as will accomplish this, and such others as will, meanwhile, conserve and enhance his own country's capacity for resistance. He must not, of course, violate the constitution or the laws; and, to a degree, he must work in coöperation with Congress. But, outside of these limitations, he and his advisers, civil and military, have a free hand.

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Naturally, the president's war powers rose to their greatest heights during the Civil War and the more recent World War. Lincoln, in addition to the active direction of operations on land and sea, authorized searches and arrests without warrants, caused newspapers to be suppressed, declared martial law in regions where the regular courts were open, suspended the writ of habeas corpus, and in other ways sought to suppress opposition to the policies of the government from persons in the North who sympathized with the southern states. With a view, also, to lessening the South's power of resistance, he issued the famous proclamation of 1863 liberating the slaves in the enemy states. Most of his acts were subsequently sanctioned by Congress and the courts. But they were originally performed on his sole responsibility, and a few were later pronounced unconstitutional. During the World War, President Wilson, also, wielded tremendous power. To a far greater extent than Lincoln, he obtained from Congress, in advance, grants of authority which he considered necessary for the successful prosecution of hostilities. The powers with which he was thus endowed, however—e.g., in the draft act of 1917, the food and fuel conservation act of the same year, and the Overman Act of 1918—transcended the topmost authority that Lincoln ever wielded.<sup>1</sup>

Illustrations from  
the Civil  
War and  
the World  
War

<sup>1</sup> The best general account of the president's war powers will be found in the books by C. A. Berdahl and H. White listed below. Useful surveys of special phases include "The Powers of the President as Commander-in-Chief in Relation to the Protection of Nationals Abroad," *Foreign Policy Information Service*, IV, No. 10 (July 20, 1928), and C. C. Tansill, "War Powers of the President of the United States, with Special Reference to the Beginning of Hostilities," *Polit. Sci. Quar.*, XLV, 1-55 (Mar., 1930).

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## CHAPTER XVI

### THE PRESIDENT AND CONGRESS

The president more than a chief executive

A reading of the constitution will unfailingly convey the impression that the president is important chiefly as an executive. "The executive power" is expressly vested in him;<sup>1</sup> on the other hand, "all legislative powers" are vested in Congress,<sup>2</sup> and "the judicial power" is assigned to the courts.<sup>3</sup> As we have seen, however, the actual distribution of authority—even as envisaged in the constitution, to say nothing of extra-constitutional developments of later days—is far from being as simple as this. Though strongly devoted to the principle of separation of powers, the constitution's makers believed also in checks and balances, with the result that they not only made many of the acts of the president as chief executive contingent on approval by Congress, or at least by the Senate, but gave the president a weighty, and sometimes a controlling, voice in the work of Congress itself. In particular, he was (1) to convene, and, under certain circumstances to adjourn, the two houses;<sup>4</sup> (2) to furnish Congress with "information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient,"<sup>5</sup> and (3) to receive all bills, orders, resolutions, or votes passed by Congress and to approve or disapprove them.<sup>6</sup>

Tendency of legislative to overshadow executive functions

How these relationships would work out in practice may or may not have been foreseen by the more astute members of the federal convention. In any case, it was not long before the dual rôle assigned the president took on an appearance decidedly different from that which it bore on paper. The executive function never ceased to be important; viewed as chief executive only, the president to-day is an imposing and powerful figure. But the primary tasks in government have to do with the shaping and control of policy, not the mere carrying out of decisions after they have been reached; and while the president and his advisers often determine policy in their purely executive capacity, policy-framing

<sup>1</sup> Art. II, § 1, cl. 1.

<sup>2</sup> Art. I, § 1.

<sup>3</sup> Art. III, § 1.

<sup>4</sup> Art. II, § 3.

<sup>5</sup> *Ibid.*

<sup>6</sup> Art. I, § 7, cl. 2-3.

is, on the whole, a legislative, rather than an executive, function. Almost from the first, the presidents found their richest satisfaction and reward in the part they were able to play in initiating, encouraging, and otherwise influencing the making of policies as embodied in acts of Congress—on finance, on commerce, on defense, and what not. And the lengths to which they might have been induced to go in this direction by personal inclination were vastly exceeded by those to which, in the course of time, they were driven by the unforeseen rise of party politics. Elected as party leaders, on platforms embodying programs of legislation, and increasingly held responsible by the people for what happened, they could hardly fail to slip more and more out of the character of chief executive into that of chief legislator. Without, of course, having ceased to be the former, presidents have in our own day become quite clearly also the latter.

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“Nor,” remarks a recent writer, “is there cause for wonderment in this. It is simply a fact that the policies of government that enlist popular interest are mainly legislative policies. Executive policies are of small moment.<sup>1</sup> Even the effect of administrative scandals is fleeting. Our presidential campaigns, to the extent that they are conducted upon any clear-cut issues of policy, are fought out normally upon the record of legislative achievements of the administration in power and proposals for constructive legislation ahead. We elect the president as a leader of legislation. We hold him accountable for what he succeeds in getting Congress to do and in preventing Congress from doing. Once in office, except for considerations of the patronage, which is politics rather than executive business, the time and thought of the president and his cabinet are devoted far more largely to legislative than to executive matters. This is true even when Congress is not in session.”<sup>2</sup> Some presidents, to be sure, have sought to keep hands off legislative work. But, as the writer already quoted observes, “no president who has, for whatever cause, attempted to self-abnegate himself as leader in the legislative program of Congress and to immolate himself upon the altar of executive duty has been aught but relatively ineffectual.”<sup>3</sup>

Why the  
tendency  
was  
inevitable

Very necessary is it, therefore, in order to get a full and connected view of what the presidency means in our system of govern-

<sup>1</sup> Not always, of course, as, for example, in the case of President Wilson's advocacy of American membership in the League of Nations.

<sup>2</sup> H. L. McBain, *The Living Constitution*, 116.

<sup>3</sup> *Ibid.*

ment, to take up here and now the president's relation to the work of Congress, even though the latter subject cannot, as such, be brought under discussion until after the executive and administrative mechanism has been dealt with more fully.<sup>1</sup> And our inquiry must penetrate beyond the more or less formal duties placed upon the president by the constitution to the extra-constitutional relationships and procedures by which his high rôle in the legislative domain was secured and is sustained.

By constitutional provision, a Congress lasts two years and has one regular session each year, beginning the first Monday in December. Hence there is no power of dissolution, such as exists in countries having cabinet systems, and the president has no absolute control over the date and length of regular sessions, except that he may adjourn the houses if they find themselves unable to agree on a time of adjournment.<sup>2</sup> Practically, however, he may wield a good deal of influence upon the length of sessions (at all events, those not automatically terminated by the expiration of members' terms), doing this either by pressing for legislation that will tend to hold the houses in session or, conversely, by withholding proposals that would have had that effect. Frequently the date of adjournment is a matter of more or less amicable agreement between the president and the Senate and House leaders. Furthermore, the president may, at his discretion, convene the houses, or either of them, in special session; and this is rather often done, particularly when a new president has taken office, and is reluctant to wait nine months before getting the administration's legislative program under way. Thus, President Taft in 1909, President Wilson in 1913, President Harding in 1921, and President Hoover in 1929 called a special session beginning shortly after inauguration day. In the last-mentioned instance, a special session, to deal with agricultural relief and tariff revision, had been definitely promised during the presidential campaign. By calling a special session at the beginning of his term, a president foregoes the opportunity to monopolize the spot-light during his "honeymoon" months, and runs the risk of being plunged almost immediately into embarrassing controversies with Congress, as, indeed, was the case with President Hoover.

The requirement that the president shall give Congress infor-

<sup>1</sup> In Chaps. XXI-XXII, XXIV-XXVII below.

<sup>2</sup> This power has never been exercised, although President Wilson was appealed to on one occasion to make use of it.

mation on "the state of the Union" and recommend to its consideration "such measures as he shall judge necessary and expedient"<sup>1</sup> is entirely logical. His duties enable him to know many things about both foreign and domestic affairs that are beyond the ken of the members of the legislative branch; he can point out defects and needs, and can suggest remedies in line with actual executive experience; and he is no less under obligation than is Congress itself to put information and ideas at the country's service. How frequently he shall communicate with Congress, at what times, at what length, and in what way, the constitution does not specify. Accordingly, each president exercises his own discretion. It long ago became customary, however, to transmit at the opening of each congressional session a comprehensive message summarizing the state of public affairs, calling attention to matters requiring prompt consideration, and perhaps indicating specific plans or measures which, in the president's judgment, ought to be adopted. In addition, shorter special messages, usually dealing with a single subject, are transmitted as occasion demands or the president desires. Washington and John Adams appeared in person before the two houses in joint session and delivered their messages orally. Jefferson, however, sent in his messages in writing; and this practice prevailed until 1913, when the oral form was revived by President Wilson. Oral messages were employed by President Harding; and, with the aid of the radio, President Coolidge read his earlier messages to both Congress and the country. Since December, 1924, however, all messages have been transmitted in writing. The oral message has some advantages: it is likely to be more concise than the written message, which, if the truth be told, has in plenty of instances been diffuse and uninteresting;<sup>2</sup> it gives the president a chance to make his personality felt; and, even though but momentarily, it brings the executive and legislative branches into a closeness of touch which is too often lacking under a presidential form of government. On the other hand, the oral message may solidify opposition and precipitate conflicts which a written communication would hardly arouse.

How influential presidential messages are is a matter upon which it is difficult to generalize. Congress is under no obligation beyond giving a respectful hearing; it may take action directly

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Messages  
to Congress

The  
effects of  
messages

<sup>1</sup> Art. II, § 3.

<sup>2</sup> That presidents sometimes labor hard to achieve brevity and force is indicated by the fact that the initial draft of President Hoover's first annual message ran to sixty thousand words and the final draft to but twelve thousand.



opposed to the recommendations made, or it may refuse to act at all. Much depends, of course, upon whether the president's party is in control of both houses. But even if it is, there is no guarantee that his advice will be followed. Sometimes, it may be added, a message is really aimed at the country, or even at the world at large, rather than at Congress. The president may desire to rouse public feeling on a given subject, with or without a view to legislation, and may use the congressional message as a means to that end. President Roosevelt did this repeatedly. Or he may want to make his attitude known to a foreign state or group of states without incurring the embarrassments that might flow from resort to the customary diplomatic channels; as, for example, when Monroe, in 1823, served notice upon Europe that the American continents were no longer open to new colonization, or when Cleveland, in 1895, told Great Britain, through the indirect and unexceptionable means of a message to Congress, that war would follow any attempt by that power to extend its sovereignty over territory which an investigating commission, then about to be set up, should award to Venezuela. In numerous oral messages during the World War, President Wilson summed up and unified the thought of the country on submarine warfare and other challenging aspects of the international situation; likewise, in the message of January 2, 1918, he set forth, practically on behalf of the Allied and Associated Powers, and in the form of the famous "Fourteen Points," the major terms or conditions deemed indispensable to a peace settlement.

Another important function of the president in relation to legislation is that of approving or disapproving bills and resolutions passed by Congress. This, of course, involves the power of veto. The veto as wielded by executive authorities was not in very high repute when the constitution was adopted; indeed, the absolute veto possessed by most colonial governors had been so unpopular that most of the Revolutionary state constitutions allowed the state governor no veto power at all. The designers of the new federal system had in mind, however, a balanced government in which each branch should be prevented from intruding upon the rights or absorbing the powers of the other branches; and the most practicable means of defense for the executive against encroachments by the legislature, *i.e.*, by Congress, seemed to be the power of veto. Furthermore, as Hamilton urged in *The Federalist*, the veto would "furnish an additional security against the enact-

tion of improper laws.''<sup>1</sup> Accordingly, the constitution requires that every bill or resolution which shall have passed the two houses of Congress shall, before it becomes a law, be presented to the president,<sup>2</sup> who, if he approves, shall sign it, and if he disapproves, shall return it, with his objections, to the house in which it originated, and it shall then become law only if both houses, by a two-thirds majority, again pass it.<sup>3</sup> The veto is, therefore, not absolute, but suspensive. It makes necessary a reconsideration of a disapproved bill or resolution; it gives the president an opportunity to present a formal argument against the measure; and it makes a second passage more difficult than the first. But it does not kill a measure for which a sufficient amount of legislative support can be mustered.

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When a bill or resolution is passed by the two houses and presented to the president, any one of four things may happen. The president may promptly sign it, whereupon it becomes law. Or, he may hold it without taking any action, in which case it becomes law at the expiration of ten days (Sundays excepted), without his signature, provided Congress is still in session.<sup>4</sup> He may take this course because he dislikes the measure and is unwilling to put his name to it, although recognizing that a veto would be useless or politically inexpedient; or because he is undecided about its constitutionality or general merit—as was President Cleveland on the income tax law of 1894—and prefers not to commit himself. Third, he may retain the measure and by so doing kill it, if Congress adjourns before the bill has been in his hands ten days.<sup>5</sup> This procedure is known as the “pocket veto,” and from the president’s point of view it may be preferable to a direct veto because of obviating the necessity of making a formal explanation to Congress. Many bills come to grief in this way, particularly by reason of the fact that large numbers of measures are rushed through Congress in the closing days of a session and require only to be “pocketed” by the president to be kept off the statute-book. Formerly, it was

Courses  
open  
to the  
president  
when a  
bill is  
presented  
to him

<sup>1</sup> No. LXXIII (Lodge’s ed., 458).

<sup>2</sup> But see qualification as to “concurrent” resolutions indicated below (p. 304).

<sup>3</sup> Art. I, § 7.

<sup>4</sup> The fact that the ten-day period is reckoned as from the presentation of the bill—not its passage—became of great importance when President Wilson went abroad to participate in the making of the treaty of Versailles.

<sup>5</sup> In the *Okanogan Indian Case*, the Supreme Court held unanimously that this means ten calendar, not legislative, days. *Okanogan Indians v. United States*, 279 U. S. 655 (1929). Cf. *Constitutional Rev.*, XIII, 104-120 (Apr., 1929); *Amer. Polit. Sci. Rev.*, XXIV, 67-69 (Feb., 1930).

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Pocket  
veto

considered that no bill might be signed after Congress had adjourned. Monroe once proposed to sign in this way a measure that had been overlooked, but was advised by his cabinet not to do so; and although Lincoln actually signed one such bill, the Senate objected and a new bill of substantially the same purport was passed and approved in regular form. Practice, wrote ex-President Taft in 1916, makes it clear that bills may not be signed under these circumstances.<sup>1</sup> Within a ten-day period following the close of the second session of the Sixty-sixth Congress, in June, 1920, President Wilson, however, signed eight bills, which thereupon became statutes equally with the fifty-one measures signed on the closing day of the session. A statement given out at the time showed that the attorney-general had held, in a formal opinion, that "the adjournment of Congress does not deprive him [the president] of the ten days allowed by the constitution for the consideration of a measure, but only, in case of disapproval, of the opportunity to return the measure with his reasons to the house in which it originated." This new and sensible view has since won rather general acceptance, with the result that presidents nowadays are able—as are the governors in most of the states—to act with some real deliberation on measures passed amid the confusion usually accompanying the close of a legislative session.<sup>2</sup>

Direct  
veto

Finally, a bill may be vetoed outright. A pocket veto, though a veto by mere inaction, amounts to an absolute veto, because Congress has no opportunity to reconsider the measure. But a direct, or "message," veto can be overcome by a two-thirds vote of both houses; if this is done, the bill becomes law notwithstanding the president's opposition. Proposed constitutional amendments, it should be observed, do not require the president's signature, and hence cannot be vetoed. "Joint resolutions," which differ from bills only in a technical way, have, when passed, the force of law, and therefore are subject to veto. But "concurrent resolutions," being mere expressions of congressional opinion, have no legal effect, and do not have to be presented to the president. The rules of each house, not being embodied in bills, are likewise exempt.

Frequency  
of vetoes

Hamilton, in the essay quoted above, expressed the opinion that the veto would "generally be employed with great caution," and

<sup>1</sup> *Our Chief Magistrate and His Powers*, 23-24.

<sup>2</sup> L. Rogers, "The Power of the President to Sign Bills after Congress has Adjourned," *Yale Law Jour.*, XXX, 1-22 (Nov., 1920). For surviving questions as to the legal effects of a pocket veto, see *Amer. Polit. Sci. Rev.*, XXIII, 380-381 (May, 1929). Cf. 70th Cong., 2nd Sess., House Doc. No. 493 (1929).

that there would be more danger of the president "not using his power when necessary than of his using it too often or too much." On the whole, this estimate has been borne out. Not until Andrew Johnson's administration did any president find it necessary to use the veto in defense of his own constitutional rights; and there were fewer than fifty vetoes, all told, before the Civil War. The first six presidents vetoed bills only on the ground that they were unconstitutional or technically defective. Jackson, who in sundry ways made the presidency something different from what it had been before, gave the veto a new meaning by using it to defeat measures admitted to be constitutional and technically correct, but considered objectionable in their aim and content.<sup>1</sup> Yet Jackson, in eight years, vetoed only nine bills. In the turbulent era of Reconstruction, the veto was employed more freely, and later presidents have not taken the conservative attitude of their remoter predecessors. Grant, in eight years, vetoed forty-seven bills; Harrison, in four years, seventeen; Cleveland, in eight years, three hundred and fifty-eight (mostly private pension bills); Roosevelt, in seven years, forty; Taft, in four years, thirty; Wilson, in eight years, twenty-six; Harding, in two and one-half years, five; Coolidge, in five and one-half years, forty-nine; and Hoover, in his first two years, nineteen. Of seven presidents who made no use of the veto power at all, the most recent was Garfield. Naturally, vetoes are likely to be most numerous when the president's party is not in control of Congress.

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The most significant thing is not, however, this increase of the number of vetoes; in proportion to the total number of bills that reach the president's desk, there are probably no more vetoes nowadays than seventy-five years ago. The really important matter is the freedom with which presidents, as one writer has stated it, "offset their own judgment against that of Congress, not merely on great questions involving the public welfare, and on disputed constitutional questions, but on trivial matters whereon their means of information are not greater or better than those at the command

General  
expansion  
of the veto  
power

<sup>1</sup> He also claimed and exercised the right to veto bills which he regarded as unconstitutional notwithstanding that the Supreme Court had ruled to the contrary. The best illustration is the veto, in 1832, of the bill to renew the charter of the United States Bank. There can be no doubt that in his broader interpretation and use of the veto power Jackson was entirely within his rights. The constitution simply says that if the president "approve" a bill he shall sign it, and if not he shall return it. "No better word could be found in the language to embrace the idea of passing on the merits of the bill." W. H. Taft, *Our Chief Magistrate and His Powers*, 16.

of Congress, and whereon their individual judgment does not appear to be superior to that of the average congressman or senator."<sup>1</sup> In other words, the veto power has been so expanded by usage as to become a general revisory power, applicable to all legislation, whether important or not, and whether relating to public matters or to private and personal interests. The result has been to make the president a far more active and potent factor in legislation than he originally was, or was intended to be.

Few  
vetoes  
overridden  
by Con-  
gress

This does not mean, however, that the veto power has, in these later days, been employed loosely and irresponsibly. On the contrary, it has commonly been used reluctantly and with all due discretion. Most vetoes have been supported by public sentiment, and very few have been overridden by subsequent action of Congress. Not until Tyler's administration did any bill disapproved by the president afterwards receive the two-thirds vote in both houses necessary to make it law. Pierce was reversed five times, and Johnson fifteen, but Grant only four times, Hayes and Arthur once each, Cleveland, Taft, and Wilson twice each, Harding not at all, Coolidge, four times, and Hoover (to March 4, 1931), twice. In practice, therefore, the veto power tends to become absolute; only rarely and with great difficulty can a sufficient vote be mustered in the two houses to override an unfavorable presidential decision. This has led to the suggestion that the veto power be diminished by making it possible for a vetoed measure ultimately to prevail by being passed in the two houses by a simple majority rather than the present two-thirds; and in 1842 Clay proposed a constitutional amendment to this effect.<sup>2</sup> On the other hand, it has been suggested that the veto be strengthened by requiring that a bill, in order to be carried over a veto, shall be repassed by an affirmative vote of two-thirds of the entire membership of both houses, rather than, as now, by two-thirds of a quorum in each.<sup>3</sup>

<sup>1</sup> E. Stanwood, *History of the Presidency from 1897 to 1909*, p. 233. For example, President Cleveland once vetoed a resolution providing for the printing of additional copies of a certain map of the United States, on the ground that a better map would soon be available.

<sup>2</sup> During the Jackson and Tyler administrations, the Whigs were continually baffled by the vetoes of a hostile president, and by the fact that, while they could carry their measures through Congress by simple majority, they could not muster the two-thirds majority necessary to override a veto. Clay's proposed amendment arose out of this experience. It may be added that in eight states a veto by the governor can be overcome by a simple majority in the two houses of the legislature.

<sup>3</sup> Effort has sometimes been made to show that this higher requirement is already the law. Thus, in a case decided by the Supreme Court in 1919, the plaintiff contended that the Webb-Kenyon Act was not a valid piece of legis-

Another, and decidedly more important, proposal looking to the strengthening of the veto power is that authority be conferred to veto single items of a bill while nevertheless approving the measure as a whole. Some people consider that there ought to be such authority in respect to all bills whatsoever; many would like to see it applied to tariff bills; but the proposal is usually directed mainly or exclusively to appropriation bills. As matters stand, the president must approve or disapprove a bill in its entirety; he cannot accept part and reject part. When a tariff bill is presented to him, he might like to veto particular schedules, and it might be decidedly to the country's interest for him to do so. But he must choose between endorsing the measure as it stands and vetoing the good with the bad. When an army bill, a river and harbor bill, or any other comprehensive measure appropriating money is placed on his desk, he can only approve or veto the bill as a whole. Among its scores, and even hundreds, of items he may find several to which he takes exception; they may involve, in his judgment, unjustifiable expenditure or sheer waste. To veto the entire measure would, however, produce friction and perhaps seriously impede the operation of some branch of the government; and, rather than incur these difficulties, the president is almost certain to return the bill to Congress with his endorsement. In this way the interests of public economy frequently suffer. All but nine of the states have met a similar situation by empowering the governor to veto separate items; and in some instances he is also allowed to reduce the amount carried by an item. The same remedy has been urged for adoption by the national government, but thus far without avail. There are, it is only fair to say, two sides to the question: power to veto items would enable the president to discriminate in a wholly undesirable manner, if he chose to do so, between proposed expenditures in which congressmen who supported him were interested and those which were of concern to his opponents; and Congress might fall into the habit, as have some state legislatures similarly situated, of gratifying departments and local constituents by voting appropriations far in excess of the estimated revenues, and thus transferring to the president the burden of whittling down the appropriations, and with it the unpopularity likely to arise therefrom. The adoption of a budget system in 1921 made

lation, since, after its veto by President Taft, it was passed in the Senate by a vote of two-thirds of the senators present, which was less than two-thirds of the total membership of that body. The court refused to take this view. *Missouri Pac. Ry. Co. v. State of Kansas*, 216 U. S. 262 (1910).

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question  
of veto  
of items

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modes of  
control  
over legis-  
lation:1. Threat  
of veto

such abuses less probable, but did not entirely obviate the danger involved.<sup>1</sup>

Convening Congress in special session, transmitting messages, and wielding the veto power by no means exhaust the president's resources in influencing legislation. By letting it be known that he will veto a pending bill unless certain features are added to it or other changes made in it, he may be able practically to determine the form which the measure will finally take, or even to prevent it from being passed at all. President Roosevelt, indeed, went so far as to give Congress public warning that he would veto certain measures which it had under consideration. Protest was raised against such virtual use of the veto power in advance, but no one could find anything in the constitution or laws to prevent a president from thus making his views and intentions known; and later presidents—notably President Hoover in connection with proposed "farm relief" legislation in 1929 and a veterans' bonus-loan bill in 1931—have not hesitated to go to similar lengths.<sup>2</sup>

2. Use of  
patronage

Another important means of presidential influence on legislation is the distribution of patronage. Custom has long since brought it about that senators and frequently representatives (if of the president's party) are consulted, and encouraged to bring forward candidates, when offices within the president's power to fill fall vacant in their respective states or districts; and success or failure in securing the appointment of favored candidates often goes far toward determining a member's standing with his constituents. The president, therefore, holds the whip hand; if congressmen do not accept his ideas on legislation, he can cut them off from a share in the patronage. Positive threats and definite bargains of this nature are not often made. Nevertheless, members of Congress can hardly be expected to be oblivious to the practical advantages of being numbered among the supporters upon whom the president will feel that he can depend.

3. Personal  
conference

Still another source of presidential influence is personal contact and conference. The president, it is true, cannot appear on the floor of either branch of Congress to take part in debate, or for any other purpose save to deliver a formal message. But this does not prevent him from discussing measures and policies with

<sup>1</sup> See p. 565. Writing before the budget system was adopted, ex-President Taft expressed grave doubt about the desirability of giving the president the power to veto items. *Our Chief Magistrate and His Powers*, 27-28.

<sup>2</sup> For Hoover's warning letter on the latter measure, addressed to the chairman of the Senate finance committee, see *N. Y. Times*, Feb. 19, 1931, p. 2.

large numbers of members, individually and in small groups, in his office at the White House, at the breakfast table, or even in the room set apart for him at the Capitol. Chairmen of committees and other influential members are frequently called into conference, especially when important legislation, *e.g.*, a great tariff bill, is pending; and on such occasions the president may urge or demand that a given measure be postponed, that it be advanced on the calendar, or that a bill be amended in specified ways. He may make a bold personal appeal, or even issue an ultimatum. In any case, his views, promptly carried back to the two houses by the conferees, are not likely to be without influence.<sup>1</sup> "Stand by the president" is, as a rule, a potent catch phrase in congressional halls. Executive control over legislation through this channel was notably augmented by Presidents Cleveland, Roosevelt, and Wilson, and has been almost equally effective in the hands of President Hoover. There arises, indeed, at this point a genuine presidential initiative in legislation. For, while neither the president himself nor any other member of the executive branch can actually introduce a bill in Congress, the president may, and occasionally does, bring about the drafting of a measure which is formally introduced by a supporter and spokesman in the appropriate house. President Roosevelt was the real author of much of the legislation enacted during his seven years in the White House, and President Wilson had hardly less to do with the shaping of the Federal Reserve Act, the Clayton Anti-Trust Act, and other great measures of his first term than with the legislation of the later war period.

If all else fails, the president may carry his case by appealing directly to the people, capturing the confidence of the country, and putting Congress in a position where it dare not stand out against his demands. Jackson did this, and so did Roosevelt and Wilson. It is a risky procedure, and the president who undertakes it "shakes the iron hand of fate." The cause must be a good one, and the president himself of real stature and even brilliance. Smaller men generally fail, sometimes in humiliating fashion; Andrew Johnson's famous "swing around the circle" in 1866 was absurd and little short of pitiful.<sup>2</sup>

One further form of presidential activity requires mention in

<sup>1</sup> A familiar example is President Taft's participation in the consideration of the Payne-Aldrich tariff bill of 1909. See F. A. Ogg, *National Progress, 1907-1917*, pp. 33-35.

<sup>2</sup> An interesting analysis of "presidential propaganda" will be found in L. Rogers, *The American Senate*, Chap. vii.



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ment of  
fact-finding  
commis-  
sions

this connection, *i.e.*, the appointment of temporary commissions charged with investigating specified subjects or problems and reporting data and conclusions which can be made the basis of intelligent legislation. Congress creates committees of its own members for similar purposes; but the commissions here referred to are initiated, appointed, and instructed by the president, with or without appropriations from Congress to cover their expenditures (salaries are never provided), and their reports are presented only to the president, for such use as he may care to make of them. The findings may be of such a nature as to be helpful merely in directing a given branch of administration, *e.g.*, the work of the government in behalf of public health. But as a rule they reveal need of new or revised legislation, which, being thereupon asked for by the president, is to all intents and purposes initiated by him. As an engineer, accustomed to the solution of problems by experts after prolonged and scientific study, Herbert Hoover came to the presidency with a firm conviction that many major questions of governmental policy can be solved, not by more or less casual study at the hands of busy and oftentimes amateur congressmen, but only by groups of specially qualified citizens who can be induced to give the matter in hand their undivided attention for a year or two, or even longer. The first years of his administration were therefore made notable by the appointment of one important investigating commission after another, *e.g.*, a commission on law observance and enforcement (1929), a series of committees preparatory to a conference on child health and protection held in 1930, a commission on illiteracy (1929), a commission on social trends (1930), a commission on unemployment (1930), a commission to investigate the conditions in, and to study the policies relating to, Haiti (1930), and another to study and report on the conservation and administration of the public domain (1930). Congress did not take altogether kindly to the practice, and in some cases made appropriations grudgingly; as a rule, it prefers to do its own investigating. And it was sometimes difficult to procure men and women of the type the president wanted. But a vast amount of fact-finding work was performed, laying the basis for programs of remedial legislation of which Congress and the country are in these days beginning to hear.<sup>1</sup> It should be added that Mr. Hoover in no

<sup>1</sup> It does not follow, of course, that all resulting action will be taken by the national government. The states and their subdivisions may be expected to draw heavily upon the information brought to light, notably on such subjects as child welfare and law enforcement.

sense originated the idea of the fact-finding presidential commission. As he himself pointed out, in a statement in 1930 defending his policy, President Roosevelt appointed no fewer than 107 such bodies, President Taft 63, President Wilson 160, President Harding 44, and President Coolidge 118.<sup>1</sup>

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It goes without saying that the president derives much of his actual control over legislation from his position as a party leader. He usually consults only his fellow-partisans in Congress on proposed appointments; he commonly seeks interviews with, and initiates legislation through, them alone; he must work in a reasonable degree of harmony with them if much is to be accomplished. Originally, the president was not a party leader; Washington thought of himself as identified with no party and chief of no faction. When, however, parties took definite form and presidents began to be elected as party men, party leadership became as truly a function of the president as it is of the English prime minister; and it is nowadays hardly a less important source of power than is the authority expressly conferred in the constitution. Jefferson, Jackson, Lincoln, McKinley, Roosevelt, and Wilson may be mentioned as presidents who in a preëminent degree dominated their respective parties. Tyler, Hayes, Garfield, and some other chief executives had less influence in this way; and Cleveland, during his second administration, was deserted by his party following. But in most of these latter instances the circumstances were exceptional, and all pointed to the practical desirability of full and recognized presidential leadership.

The  
president  
as party  
leader

The president is elected as a party man. He must surround himself with advisers who are of his own political faith. He must depend mainly on his fellow-partisans in Congress for the legislation necessary to the carrying out of his program. He represents the party throughout the whole country, as congressmen do not, and the country looks to him, even more than to Congress, for the execution of the policies to which his party is pledged. Everything that affects the standing and prospects of his party is of consequence to the success of his administration, and therefore of concern to him personally. Not unnaturally, he will expect to have, even though in purely informal ways, the supreme direction of his party's affairs. He chooses the chairman of the national

His party  
activities

<sup>1</sup> *New York Times*, July 29, 1930, p. 5. On the somewhat analogous development of advisory committees in Great Britain, see J. A. Fairlie, "Advisory Committees in British Administration," *Amer. Polit. Sci. Rev.*, XX, 812-822 (Nov., 1926).

committee, and may further influence the composition of that body and of other party committees; he may take a hand in the selection of congressional and other candidates, and may appeal to the voters to give them their support, as did President Roosevelt in the congressional elections of 1906 and President Wilson in those of 1918; he may suggest, and even dictate, important planks in party platforms, both national and state; he may, indeed, practically dictate his own renomination or the nomination of the man whom he favors as his successor, as President Roosevelt forced the nomination of Taft by the Republicans in 1908; and he acts in close conjunction with, and if necessary brandishes the party whip over, his fellow-partisans in Congress as a means of procuring the legislation that he desires.

Control of  
the presi-  
dent by  
Congress

Naturally, the president's actual influence upon legislation depends considerably upon his personality, upon the state of public affairs, and especially upon whether his party is in control of both branches of Congress. Furthermore, influence and control do not flow in only one direction; the president is himself subject to a certain amount of guidance, and to a large amount of control, from Congress. In the give and take of personal relations with senators and representatives, he may be induced to change his views or caused to modify his policy. Defeat of his measures or refusal of his requests may compel him to abandon a program in which he firmly believes. The Senate may reject his nominations to civil and military offices and refuse its assent to the ratification of treaties negotiated under his direction. Either house, or both, may make demands upon him for documents or information which he cannot well withhold, however much he might prefer to do so,<sup>1</sup> or may institute investigations of executive or administrative work for which he is directly or indirectly responsible.<sup>2</sup> Congress may pass laws imposing new duties upon him or his subordinates, and may similarly limit the discretion of executive officers and require them to do given things in a given way, irrespective of the president's wishes. Even a supposedly friendly Congress may flout the administration's policy a dozen times in a session; the Senate, in

<sup>1</sup> A notable and comparatively recent clash at this point was precipitated by the Senate's demand upon President Hoover, in July, 1930, for secret data relating to the London Naval Treaty. See D. F. Fleming, "The Advice of the Senate in Treaty-making," *Curr. Hist.*, XXXII, 1090-1094 (Sept., 1930), and contemporary newspapers. Senate demands relating to foreign affairs usually recognize the necessity of discretion in this domain by incorporating the phrase "if not incompatible with the public interest."

<sup>2</sup> See p. 524 below.

particular, is prone to assume an attitude best described as "baiting the president."<sup>1</sup> Finally, the House of Representatives may bring the president to trial under impeachment proceedings which, if successful when heard before the Senate, will lead to his removal from office.

Nevertheless, the salient fact about the presidency is its steady accumulation of power, in the matter of removals, in the conduct of war, in the use of the veto, and even in the general control of public policy as shaped ostensibly by the legislative branch. The earlier presidents, as we have seen, took a modest view of their power. They were "just about what the framers of the constitution expected the incumbents of the office to be."<sup>2</sup> Jackson, however, brought to the position not only an aggressive temper but an impatience with restrictions and with conservative traditions which was characteristic of the section from which he came and of the generation in which he lived. In his hands, the presidency became a far more potent instrumentality than before; and although after his day the office had its ups and downs, as it passed from stronger to weaker hands and back again, and as the times demanded of the chief executive a vigorous rôle or permitted a more passive one, none of Jackson's successors ever knowingly gave up a particle of the power which he claimed, and every fresh advance which they—Polk, Lincoln, Cleveland, McKinley, Roosevelt, Wilson, Hoover—made became, in turn, a point of departure from which still more exalted claims to authority were projected. More and more, the presidency has become an office "offering opportunity," as Mr. Hoover has somewhat rhetorically remarked, "to speed the orderly march of a glorious people."<sup>3</sup>

The reasons for this enlargement of presidential power are not to be found in considerations of personal ambition and aggrandizement. Most of the presidents, being human, have found pleasure in the exercise of authority; but few, if any, have coveted power for its own sake, and the fear of some men in earlier days that the president would so overbear the other organs of government as to pave the way for monarchy has proved entirely groundless. The president's power has grown, in the first place, because the power

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Steady  
growth  
of presi-  
dential  
power

The need  
of presi-  
dential  
leadership

<sup>1</sup> For an excellent illustration, drawn from the Senate's attitude toward President Hoover in the special session of 1930, see *New York Times*, July 23, 1930, p. 8.

<sup>2</sup> W. B. Munro, *Government of the United States* (rev. ed.), 130.

<sup>3</sup> H. C. Black, *Relation of the Executive Power to Legislation*, Chap. 1. For other references on this subject, see p. 269, note 3, above.

of the national government as a whole has grown; merely to keep pace with this general expansion—the causes of which are considered elsewhere,<sup>1</sup> would have entailed large extensions of presidential authority. Equally important, however, has been the urgent need of presidential leadership—in legislation and in general policy-framing—in lieu of the initiative and leadership which in a cabinet system of government like the English are wielded by the prime minister and his associates. Experience shows that Congress, when left to its own devices, tends to disintegrate into partisan and sectional elements and to flounder in a bog of contrary purposes. Even if there is capable and recognized leadership in the houses singly, there is usually no one save the president to bring the two branches together in effective support of great policies and measures. More and more, the people look to the president, not simply to speak for them in dealings with foreign governments, but to wield such a coördinating and directing power in domestic affairs as will get the things done that they desire; they expect him to manage Congress, and if he does not do so, they pronounce him a failure. “The nation as a whole,” a former incumbent of the office has said, “has chosen him [the president], and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its president is of such insight and caliber. Its instinct is for unified action, and it craves a single leader.”<sup>2</sup>

Roosevelt  
and Wilson  
as leaders

President Roosevelt “recognized and acted upon these facts more fully than had any occupant of the White House since Lincoln; and largely on that account his presidency became a noteworthy period of constructive legislation and national revival. President Taft inclined to a legalistic view of the chief executive’s functions, and hesitated to assert legislative leadership. He failed to get the legislation which the nation demanded; accordingly, the record of his administration was dimmed, and his own political

<sup>1</sup> See Chap. xxviii below.

<sup>2</sup> W. Wilson, *Constitutional Government in the United States*, 68.

fortunes were done irreparable damage. President Wilson, who admired the English cabinet system and long before his election had believed that our president ought to become something like a prime minister,<sup>1</sup> promptly assumed a leadership such as not even Roosevelt had conceived. . . . Many times his intervention in the work of law-making was denounced as dictatorial by his opponents, and it was disliked by some members of his own party. But his personal activity became a principal factor in his administration's imposing record of constructive and remedial legislation; and his conception and example of presidential leadership in legislation became his chief contribution to American political methods."<sup>2</sup> President Harding was borne into office on a wave of reaction against the Wilson administration, and, coming fresh from the Senate, he started out to allow Congress to handle its business with a minimum of presidential interference. A few months, however, sufficed to show that the houses were incapable of making headway on this basis, and executive leadership was gradually and cautiously revived on the lines with which the country had grown familiar. Loyal support by substantial congressional majorities, President Coolidge coasted through an era of national prosperity without really ever having his qualities of leadership put to serious test. President Hoover fell upon less fortunate days and was obliged to fight for most things that he got, revealing a capacity for leadership which, though still leaving something to be desired, grew perceptibly as the novice in politics and legislation gradually gave way to the expert.<sup>3</sup>

Certain qualities, it is manifest, a president must have if he is to be successful; except under rare circumstances, he will realize the possibilities of his high office only in the degree in which he possesses them. He must be alert; he must be honest; he must be courageous; he must be tactful; he must have the gift of working with, and of managing, men; above all, he must be capable of making large decisions promptly, intelligently, and in clear-cut fashion. Not all presidents have fully measured up to these requirements. The office has happily been preserved unsullied by personal turpitude; but some incumbents have been too lenient

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What sorts  
of men  
reach the  
pres-  
idency?

<sup>1</sup> See his *Congressional Government; A Study in American Politics* (original ed., Boston, 1885), Chap. v.

<sup>2</sup> F. A. Ogg, *National Progress, 1907-1917*, pp. 227-228. See L. Rogers, "President Wilson's Theory of his Office," *Forum*, LI, 174-186 (Feb., 1916).

<sup>3</sup> On presidential leadership in general, see W. S. Myers, *American Democracy To-day* (Princeton, 1924), Chap. iv.

toward self-seeking and corrupt men surrounding them. No president has been wanting in patriotism; but some have lacked courage and decision, and one or two have been notably deficient in tact. It is self-evident that the presidency is not uniformly in the hands of strong men. Forty-five years ago, Mr. (later Lord) Bryce included a chapter in his *American Commonwealth* entitled "Why Great Men Are Not Chosen President."<sup>1</sup> It was not meant, of course, to imply that none such is ever chosen; but the exceptions were regarded as merely numerous enough to prove the rule. Had the election of the president continued on the lines planned by the fathers, the record would probably have been better. But, once it became a party matter, with the candidates too often selected on grounds of mere personal and geographical "availability," and with the people making the actual choice, the results could hardly be expected to be different from those we have witnessed. The rough and tumble of party politics kept Clay, Calhoun, Webster, Sherman, Blaine, Hughes, Davis, and Smith from the presidency, and brought into the office mediocrities like William Henry Harrison, Pierce, Buchanan, Johnson, and Harding. On the other hand, it is but fair to observe that the system gave us Lincoln, Cleveland, Roosevelt, and Wilson, and that, as Lord Bryce in later days observed, "things have on the whole gone better than might have been predicted."<sup>2</sup> The feature that stands out most prominently of all, however, is the tremendous growth of the power and importance of the presidency as an institution, relatively unaffected by lack of force and capacity on part of the incumbent at any particular time.

Nothing, indeed, better illustrates the living, changing, dynamic character of our government than the readjustments continually taking place in the relations between the executive and

<sup>1</sup> Vol. I, Chap. viii.

<sup>2</sup> *Modern Democracies*, II, 73. For an interesting study of the professional backgrounds of American presidents, see S. Herbert, "The Premiership and the Presidency," *Economica*, No. 17 (June, 1926). The writer shows that while our presidents do not uniformly have legislative experience, as do British premiers, a majority of them have had—usually in state legislatures, occasionally in the national House of Representatives, rarely in the national Senate. A great deal of illuminating information on the presidency and its practical workings can be gleaned from *Theodore Roosevelt; an Autobiography* (New York, 1913); L. Einstein, *Roosevelt* (Boston, 1930); W. E. Dodd, *Woodrow Wilson and His Work* (Garden City, 1920); H. S. Duffy, *William Howard Taft* (New York, 1930); and *Taft and Roosevelt: the Intimate Letters of Archie Butt* (2 vols., New York, 1930). For interesting characterizations of two recent presidents, see P. W. Slosson, "Calvin Coolidge: His Place in History," *Curr. Hist.*, XXXIII, 1-6 (Oct., 1930), and "Warren G. Harding: A Revised Estimate," *ibid.*, 174-179 (Nov., 1930).

legislative branches, notwithstanding that the provisions of the written constitution pertaining to the subject go on from generation to generation unaltered. In the nature of the case, perfect equilibrium, even if desirable, can never be attained; and proposals for improvement form a perennial theme of discussion. Especially is it urged that the subterranean and extra-legal methods of executive influence and leadership now employed be replaced by arrangements and procedures based frankly on the new relationship that has arisen. Concrete proposals to this end naturally vary. To begin with one of the mildest, it is suggested that while the president himself shall retain his isolated position, the heads of executive departments, composing his official family, shall be given seats in Congress, from which, without becoming members, they may explain and defend measures in which the administration is interested and answer questions concerning these and any other matters upon which members may care to interrogate them. As civil officers of the United States, department heads are ineligible to membership in either house.<sup>1</sup> But for the purpose in view, it would not be necessary to make them members. Either branch of Congress can always admit to the floor any person it chooses, and distinguished visitors, *e.g.*, Prime Minister MacDonald in 1929, are occasionally invited to speak. Heads of departments, indeed, are now sometimes seen mingling with members on the floor or in the cloakrooms, although they would hardly be allowed to address either house as such. With increasing frequency, too, the secretary of state and other department heads appear before congressional committees to give information and answer questions.<sup>2</sup> Would it not be better, it is asked, to give the entire membership of either house, or of both houses, a chance to hear what they have to say and to question them in the same direct manner in which ministers are questioned in the British House of Commons? In the first Congress, it is interesting to note, executive officers not only appeared upon the floor of both houses but presented information and replied to questions; in 1865, a bill regularizing this practice in the case of the heads of departments was reported favorably; in 1881, a Senate committee brought forward a similar plan. The earlier practice, however, never struck root;

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Proposals  
for closer  
relations  
between  
the execu-  
tive and  
legislative  
branches:

1. Heads  
of depart-  
ments to  
appear  
before the  
House and  
Senate

<sup>1</sup> Art. I, § 6, cl. 2.

<sup>2</sup> For Secretary Stimson's appearances before the Senate committee on foreign relations, and informally on the floor of the Senate itself, when the London Naval Treaty was under consideration, in May and June, 1930, see contemporary newspapers.



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of depart-  
ments to  
be made  
full mem-  
bers of  
Congress3. Priority  
to be given  
"adminis-  
tration"  
bills

Objections

and all attempts to revive it have failed, although not from any lack of earnest proposals, both inside and outside of Congress.<sup>1</sup>

Some people would go considerably farther than this. The president and the principal departmental officers do actually, as everybody knows, initiate a great deal of legislation. They have to do so, however, in indirect, roundabout fashion, through senators or representatives whom they can persuade to introduce their bills. Why not amend the constitution so as to make the heads of departments actual members of Congress, with the right not only to take part in debate but also to introduce bills, to serve on committees, and to vote? Even this would not satisfy all who profess dissatisfaction with the present arrangements. Why not also have the rules of procedure of the two houses so amended as to give preferred treatment to administration, or "government," proposals? For, obviously, executive leadership can attain its fullest scope only if and when the measures originating with the president and his advisers in the departments are assured prompt, full, and decisive consideration on Capitol Hill. Occasionally—though not often—one hears the suggestion that Congress should largely or wholly give up its present powers of legislative initiative and content itself with receiving and acting upon the measures brought to it from the White House and the departments.

For the more modest of these various suggestions, there is a good deal to be said. Occasional attendance of heads of departments in the House or Senate to explain proposals and answer questions would probably prove an advantage. Short of this, however, much could be gained by more frequent appearance of such officers before committees; and it does not seem to have occurred

<sup>1</sup> According to the testimony of Colonel House, President Wilson in 1917 had in mind writing a book explaining "the necessity for a more responsible form of government and for having cabinet members sit in the House of Representatives." This, he thought, "would eventuate in something like the British system." C. Seymour [ed.], *Intimate Papers of Colonel House* (Boston, 1926-28), III, 47. The plan was probably nearest consummation in 1921, when three bills providing for it were before Congress, and when the scheme was viewed favorably by President Harding and his cabinet. One of the bills proposed to admit to the floor of the House and Senate not only cabinet officers but heads of important commissions and boards. Bills on the subject are introduced in practically every session. For an illuminating argument against the plan, see R. Luce, *Congress—an Explanation* (Cambridge, 1926), 110-116; and for both favorable and hostile views, P. Belmont and H. White, "Executive Officers in Congress," *Const. Rev.*, XII, 133-156 (July, 1928). In "Congress Seats for Cabinet Members," *ibid.*, XIII, 36-44 (Jan., 1929), H. F. Wright cites eleven former department heads (J. R. Garfield, Elihu Root, W. L. Fisher, W. C. Redfield, T. W. Gregory, C. E. Hughes, H. S. New, W. H. Hays, E. Denby, T. H. Newberry, and N. D. Baker) as favorable, and four (V. H. Metcalf, J. B. Payne, R. Lansing, and D. F. Houston) as opposed.

to the advocates of the plan that, instead of expediting business, the effect might very well be to slow it up if members hostile to the administration were to indulge their natural bent to ply its spokesmen with questions provocative of debate. The extremer proposals are of even more doubtful value. To make cabinet officers members of Congress would contravene the theory underlying our entire system of government; to give the administration a virtual monopoly of legislative initiative and of the working time of the two houses would be to displace that theory entirely in favor of the theory of English government—a theory which certainly has much to commend it, but which nevertheless is alien to the traditions and spirit of American institutions, and not capable of being applied successfully unless we decide to reconstruct our system root and branch. We have executive leadership already, at least when we have a strong president; there are means by which, if it tends to be too secretive, it can be driven into the open; conversely, through the press and other channels it can always secure as much publicity as it wants and defend administration bills as forcefully as it chooses.<sup>1</sup>

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There is no denying that the theory of separation of powers is gradually losing its hold in this country, and that the establishment of closer working relations between the executive and legislative branches is, from most points of view, desirable, and increasingly recognized to be so; perhaps three-fourths of all current discussions of governmental reform center in this general problem. People see much more clearly than in the old days that the conception of president and Congress as occupying "two islands of separate and jealous power" ought to be made to give way to the feeling that there is but one government, harmonious in aim and operation. It will not do to assume, however, that we are about to adopt the cabinet system of England and other foreign lands, or that we ought to do so. As has been pointed out elsewhere,<sup>2</sup> there is much to be said for the cabinet system. It makes for unity, sensitiveness to popular feeling, and concentration of responsibility. But the success of it in England, or even in Canada and Australia, does not prove that it would yield satisfactory results

No prospect of adoption of the English cabinet system

<sup>1</sup> As for the matter of "administration" bills, it is true now, in actual practice, that measures introduced by members who are known to be "on the inside," and to be acting at the instigation of administrative chiefs or with the approval of the president, are often given the right of way. P. D. Hasbrouck, *Party Government in the House of Representatives* (New York, 1927), 76.

<sup>2</sup> See p. 47 above.

in the United States, even if to adopt it were an easy possibility. In point of fact, it is hard to conceive of it being adopted among us at all. Our entire political experience has proceeded on different lines, and to change over from our present presidential form to the cabinet form would entail, not only drastic amendments of the written constitution, but, as has been said, a reconstruction of the entire theory on which our governmental system is based. Much has been gained by bringing the president and Congress out of their earlier isolation, and there is room for further improvement in their interrelations; the admission of heads of departments to the floor of Congress, without votes, is practicable, desirable, and, one may venture to add, probable.<sup>1</sup> But it is useless to spend words at this late day on relegating the president to the position of titular head of a cabinet-governed country, or on inducing Congress to relinquish its full power of legislative initiative. If these things come about at all, it will be only after the adoption of transitional measures which themselves are as yet quite beyond the horizon.<sup>2</sup>

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<sup>1</sup> The likelihood that this will eventually come about is increased by the enactment of the budget law of 1921 (see p. 565) below. The budget is prepared by the executive authorities, and it is plausibly argued that they ought to have an opportunity to explain and defend it on the floor of Congress. Ten years, however, have brought no developments of the kind.

<sup>2</sup> For a discussion of what the introduction of the cabinet system in the United States would mean, see A. L. Lowell, *Essays on Government*, 25-45. See also W. MacDonald, *A New Constitution for a New America*, Chaps. VI-VIII, and H. W. Horwill, *The Usages of the American Constitution*, Chap. VI.

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## CHAPTER XVII

### OLDER EXECUTIVE DEPARTMENTS—ORGANIZATION AND FUNCTIONS

The president and the work of government

The president is a busy, and doubtless an over-worked, man; but he does not manage the country's affairs single-handed. There are no more hours in his day than in any other man's, and he cannot so much as know about—much less perform—a thousandth part of the multifarious tasks that endlessly call for official thought and effort. He cannot personally carry on our dealings with three score foreign states, or collect the national revenues, or see to the construction of public buildings, or administer the postal service. Though chief executive, he cannot directly and personally execute any appreciable portion of the nation's laws. By employing every time-saving device, he contrives, it is true, to keep his hand on the governmental mechanism in all of its larger parts, and himself to settle an amazing number of questions and transact an incredible amount of business. When circumstances require, he concerns himself laboriously with administrative details. In the main, however, he works through subordinates; and for months, and even years, at a stretch, his actual contact with a smoothly-running branch of the government service may be scant indeed.

Importance of the administrative system

The part of the government of which the president is in the truest sense head, *i.e.*, the executive and administrative system, is, nevertheless, in many respects the most important of all. In the first place, it is in action all of the time, day and night, three hundred and sixty-five days out of the year, whereas other branches function only at intervals. Congress sometimes goes as long as nine months without a meeting, and the courts are accustomed to lengthy recesses between terms. The work of administration, however, must be kept up ceaselessly; individual administrators may take vacations, but administration is never adjourned. In the second place, it is administration that brings the government closest home to the people. Congress may deliberate through long months in Washington, and enact laws by the hundred, without touching the citizen or his pocket-book unless these laws are applied and enforced locally throughout the land by the admin-

istrative authorities. By the same token, it is the quality of administrative performance that mainly determines the satisfactoriness or otherwise of the government, considered as a whole. Good laws are, of course, desirable, and justice through the courts is indispensable. But it is easier to get good laws and impartial court decisions than to secure uniformly and dependably economical and efficient administration. The legislature need only declare its will in an act of broad and general scope, and thereupon its work is finished. The real task remains—to fit the terms of the measure to the existing public situation, to select the officials who are to interpret the law and apply it, to instruct, supervise, and discipline these officials, to settle innumerable questions of detail (many of them involving important matters of principle), to prevent laxity, favoritism, and fraud. If, as a well-known writer has remarked, administration “is conducted wisely and efficiently, it may render incalculable services to the people; if it is managed justly, it will command the affections of those whom it serves, building the foundations of social order on the respect and esteem of all classes. If it is inefficient and unjust, it may cast discredit upon the social order and lead to its disintegration and decay.”<sup>1</sup>

As was pointed out in an earlier chapter, administration is assuming a steadily increasing importance in the modern state;<sup>2</sup> and nowhere is this more true than in our own country, whether in relation to the national, to state, or to county and municipal government. In all cases, the reasons are traceable largely to the growing complexity of social and economic life, and to the resulting tendency of legislatures to content themselves with the enactment of general laws, thereby making it necessary for the administrative authorities to exercise large rule-making powers, whether they enjoy doing so or not. In the domain of the national government, the development has been the more noteworthy because of the rapid extension in multifold directions of regulatory activities once severely limited but now carried to the most surprising lengths.<sup>3</sup>

<sup>1</sup> C. A. Beard, *American Government and Politics* (5th ed.), 38.

<sup>2</sup> See pp. 47-49 above.

<sup>3</sup> See Chap. xxviii below. In a recent report on research in administration in the United States, Professor J. M. Gaus has suggested that an illuminating commentary on the growth of public administration, and of attitudes toward it, in this country is supplied by four essays, widely separated in time and circumstance: (1) Henry Adams, “Civil Service Reform,” *No. Amer. Rev.*, CIX, 443-475 (Oct., 1869); (2) Woodrow Wilson, “The Study of Administration,” *Polit. Sci. Quar.*, II, 197-222 (June, 1887); (3) C. A. Beard, “Administration in a Great Society,” *American Government and Politics* (4th ed.,

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in these  
chapters

It is to the great agencies of national administration that we now turn, in order to see how the huge volume of government business which the president himself cannot possibly transact is allocated and performed. First, the ten executive departments, constituting the major arms or branches, will be passed in review, with so much attention as space will permit to their structure and functions, and to the manner in which they have lent themselves to the steady expansion of national authority and control. Next, a word will be said about the extraordinary growth of investigative, advisory, and administrative agencies standing outside of the departments, and hence known as the "independent establishments," *e.g.*, the Interstate Commerce Commission, the Federal Trade Commission, and the Tariff Commission. Various problems of reorganization affecting the departments and commissions will claim attention. And finally, a chapter will be devoted to "the men (and women too) in the trenches," *i.e.*, the host of lesser officials and employees—more than 600,000 in number—who constitute the "executive civil service."

General  
features  
of the de-  
partments

Before taking up the executive departments one by one, certain fundamental features of the system as a whole require a word of emphasis. (1). The national government, as we have observed,<sup>1</sup> maintains its own nation-wide force of officials and employees, and only rarely presses into its service officials and employees of the states. There is, it is true, a growing interdependence of national and state administration, as in the domain of prohibition enforcement. But it is not the American plan to devolve upon state authorities—as the German and Swiss republics so freely do—the carrying out of multifold national laws and regulations. The national administration is essentially a separate and self-sufficient mechanism. (2). Though by no means fully adhered to in practice, the theory is that the government's administrative work will be organized in or under a series of coördinate executive departments created by act of Congress. The constitution does not directly provide for departments, or say how many there shall be, or what they shall be called. It, however, plainly assumes that departments will exist; it authorizes the president "to require the opinion, in writing, of the principal officer in each of the executive depart-

New York, 1924); and (4) L. D. White, "Public Administration," in *Encyclopædia of the Social Sciences* (New York, 1930), I, 440-450. See J. M. Gaus, "The Present Status of the Study of Public Administration in the United States," *Amer. Polit. Sci. Rev.*, XXV, 120-134 (Feb., 1931).

<sup>1</sup> See p. 100, above.

ments;" and it empowers Congress "to vest the appointment of inferior officers in the heads of departments." Though the independent establishments have attained impressive numbers and importance, the ten great departments thus far set up lend the national administration a greater degree of unity and coördination than is found in the administrative arrangements of a majority of the states. (3). There is some overlapping of functions among the departments, and occasionally an official has to do with the work of more than one department. Speaking broadly, however, each department is separate from the others in both functions and personnel.

(4). In their internal organization, the departments vary rather widely, yet certain features appear quite regularly. In the first place, all are organized under single heads. The constitution does not require that this shall be so; although it is fair to assume that when the framers wrote the provisions concerning department heads they had in mind individual officials, not boards or other groups. Boards and commissions are employed in most of the independent establishments, and are widely used in the state governments. But every national department is presided over by a single official, known in most instances as a secretary. Furthermore, practically all of the departments have from one to four assistant secretaries and a chief clerk. Two (State and Treasury) have recently acquired an under-secretary—an official who serves as a general administrator under the direction of, and in the absence of, the department head, and who is proving of such usefulness that similar provision is likely to be made in other departments. And the work of each department is distributed among a considerable number of bureaus and divisions, usually with a single head (variously known as "commissioner," "director," "comptroller," or "chief," and with functions so grouped as to give each bureau or division a coördinated and unified task to perform; although the distribution is not always logical or stabilized, and the relation of bureau to division follows no clear principle. (5) Heads of departments are directly and fully responsible to the president. Congress can impose duties on them with which the president cannot interfere, and it can remove them by impeachment. But whatever is done by any one of them is considered as done by the president himself, with whom, in the final analysis, complete responsibility rests. Very different, therefore, is the position of department heads in our system from that occupied by corresponding officials in



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Considerations influencing the selection of department heads:

## 1. Party status

cabinet-government countries, responsible as they are, completely and directly, to the popular branch of the legislature.

As we have seen, the heads of departments occupy a dual position; they are at the same time (a) chief administrators of their respective branches of the government service and (b) advisers to the president on questions of public policy, and, to some extent, on party matters. Speaking broadly, they are selected with both the administrative and advisory functions in mind. Several other considerations, however, play some part. First, the appointees must normally be of the president's party. Washington made Jefferson secretary of state and Hamilton secretary of the treasury. But friction arose, and it soon proved desirable to bring the chief offices into the hands of men who stood closer together in political matters. Since 1795, the principle of party solidarity has been followed closely. Cleveland, indeed, appointed to the position of secretary of state a man who had been thought of as a Republican candidate for the presidency.<sup>1</sup> But the appointee had supported Cleveland in the electoral campaign. Roosevelt and Taft each appointed a Democrat as secretary of war. But in both instances the appointee had not been prominent in national politics. The same was true of a Democrat appointed attorney-general by Hoover. The few exceptions merely prove the rule. This regard for party affiliation does not mean, however, that only party leaders are appointed. The earlier tendency to look upon the cabinet as a council of party leaders has pretty much come to an end. The appointees belong to the party in power at the White House; but, as a rule, half or more of them are not party leaders in any proper sense of the term, and some have had no active part in politics whatever.<sup>2</sup>

## 2. Other grounds

Other practical considerations which more or less influence the president's selection are geographical distribution and the representation of various wings or factions of the party. It will not do to take all of the cabinet officers from the East, or from the West, or from any single section of the country. Although President Wilson's first cabinet included members from eight different states, it was criticized in some quarters because—as was

<sup>1</sup> Walter Q. Gresham.

<sup>2</sup> W. Wilson, *Constitutional Government in the United States*, 75-76. On the other hand, of course, members are occasionally chosen mainly or solely because of their services as party leaders or officers. An example is the selection of Mr. Will H. Hays for the postmaster-generalship by President Harding, whose campaign the appointee, as chairman of the Republican national committee, had managed.

also true for a time during Roosevelt's presidency—three were residents of a single state, *i.e.*, New York. Appointment of representatives of different elements in the president's party is designed, of course, to conciliate opposition and to promote solidarity. A good illustration is President Wilson's appointment of Mr. Bryan as secretary of state in 1913, with a view to winning for the administration the support of the more radical wing of the Democratic party. Still another powerful factor is personal friendship and favor. Every president takes into his official family men whom he knows but slightly; but he is likely to include also one or two men who, whatever other claims they may have, are first of all personal friends. President Jackson added to the political liveliness of his time by appointing his friend Major Eaton secretary of war; President Grant made his patron of early days, E. B. Washburne, secretary of state; Presidents Fillmore, Harrison, Cleveland, and McKinley found portfolios for their law partners; Presidents Roosevelt and Harding made several appointments in which the personal factor was prominent; President Coolidge, after being balked by the Senate in his effort to fill the attorney-generalship with a prominent Michigan lawyer, turned to an obscure, small-town Vermont attorney who had long been an intimate acquaintance; and President Hoover gave the secretaryship of the interior to his boon companion on fishing trips, President R. L. Wilbur of Stanford University. All told, however, a steadily increasing proportion of cabinet officers are chosen for their special knowledge and experience or their administrative ability, proved or presumed. Frequently, they are men who have not been in politics, but have attained eminence in the professional or business world. The secretary of the treasury is very likely to be of this type, as, for example, William G. McAdoo and Andrew W. Mellon; the secretaries of commerce and agriculture also, as in the instances of Herbert Hoover, David F. Houston, William M. Jardine, and Robert Lamont. Three-fourths of an average cabinet group have had previous experience in public office; about half have served in Congress. Contrary to early practice, few are now carried over from one administration to another, even when there is no change of the party in power.<sup>1</sup>

Heads of departments exercise their functions in both indi-

<sup>1</sup> A vice-president called upon to fill out a term usually, however, continues the cabinet unaltered, at least for a time. For a characterization of the members of a typical cabinet (that of President Coolidge as it stood in 1925), see *Amer. Yr. Bk.* (1925), pp. 106-120.

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of depart-  
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as adminis-  
trative  
officers:1. Direc-  
tion

vidual and collective capacities: individually, they have charge of major branches of administration; collectively, they form the president's cabinet. As cabinet officers, they have been considered sufficiently at an earlier point;<sup>1</sup> but as chiefs of the departments to be described below, they call for additional comment.

2. Appoint-  
ment and  
removal

Subject to direction by the president, and to a certain amount of control by Congress, each department head guides and supervises the work of all bureaus, divisions, offices, and other agencies in the department under his care. He cannot personally watch the whole of it, but he must keep himself informed upon it, and must be at all times ready to assert his superior authority in the interest of harmony and efficiency. In the second place, he exercises substantial control over the personnel of his department. This he does mainly through the appointment of such inferior officers as Congress, under the familiar constitutional provision dealing with appointments,<sup>2</sup> authorizes to be named in this way. Most of the positions thus arranged for are now included in the classified service, and are filled in accordance with civil service regulations to be explained later.<sup>3</sup> This, of course, narrows the appointing officers' discretion. The power is, nevertheless, an important one; and it is supplemented by a somewhat restricted, yet substantial, power of removal.

3. Issuing  
regulations

Another very important function is that of issuing rules and regulations covering various aspects of the department's administrative work. The president, as we have seen, has an extensive ordinance power.<sup>4</sup> But in many cases the administrative regulations issued by virtue of this power are prepared in the departments and issued in their name, or even in the name of a bureau or division. The president may direct such regulations to be issued, and may insist on seeing and approving them before they are sent out. But in most cases the department officers may themselves take the initiative. Indeed, each department head is authorized by statute "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it," and also to make appropriate rules to secure a proper examination of accounts. Furthermore, specific ordinance powers covering other matters have been conferred on particular

<sup>1</sup> See pp. 263-265 above.<sup>2</sup> Art. II, § 2, cl. 2.<sup>3</sup> See pp. 387-392 below.<sup>4</sup> See p. 280 above.

department heads, bureau chiefs, commissions, and other administrative agencies. For example, the secretary of the treasury has been authorized to prescribe regulations for enforcing the customs and internal revenue laws, and for preventing the introduction of contagious and infectious diseases at our ports; and the secretary of agriculture has been authorized to make rules governing the importation and interstate movement of animals and plants, the protection of forest reservations and of migratory birds, and the execution of acts of Congress relating to meat inspection.<sup>1</sup>

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Still another important thing that the department head has to do is to decide disputes arising out of the acts of his subordinates. In the administration of the laws governing such matters as immigration, foreign and interstate commerce, taxation, and public lands, great numbers of controversies inevitably come up. Persons adversely affected may feel that an official has exceeded his powers, or that he has reached a decision not warranted by the facts in the case; and fairness demands that an opportunity be allowed for a reconsideration of the decision or action. Conceivably, all such questions might be carried to the courts. But it has been pointed out that, while appeal to the courts is proper when the construction of a law is involved, such appeal, if permitted in the general run of disputes arising out of the ordinary daily transactions of the departments, would "entail practically a suspension of some of the most important functions of government."<sup>2</sup> Hence, except under the condition mentioned, appeal normally lies only to higher administrative officials or boards, including the heads of departments; and in many kinds of cases the decision of the department head is final, although in others there is appeal to the president himself.<sup>3</sup>

4. Deciding appeals

It is the duty of the head of a department to give both the president and Congress information and advice on matters pertaining to his branch of the service. The Treasury and Post-Office departments were organized without reference to presidential control, and the Treasury head reports to Congress directly. In the

5. Giving information

<sup>1</sup> This general subject is treated in J. A. Fairlie, "Administrative Legislation," *Mich. Law Rev.*, XVIII, 181-200 (Jan., 1920), and more fully in J. P. Comer, *Legislative Functions of National Administrative Authorities* (New York, 1927).

<sup>2</sup> *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94 (1902).

<sup>3</sup> L. F. Post, "Administrative Decisions in Connection with Immigration," *Amer. Polit. Sci. Rev.*, X, 251-261 (May, 1916); G. R. Pierce, "The Land Department as an Administrative Tribunal," *ibid.*, 271-289; E. C. Finney, "The Board of Appeals of the Department of the Interior," *ibid.*, 290-295.

acts creating the State, War, and Navy departments, the president's directing authority is expressly recognized; and in the measures establishing the remaining departments, it is clearly implied. In practice, however, all departments are on a common footing in this matter; all make reports which quickly become the common property of the president and Congress, and both of these superior authorities may call upon them at any time for information. The president usually asks the department head orally for any data that he desires, although he may make the request in writing. Congress, or either house, makes its requests through the medium of resolutions. Armed with the power of removal, the president is able to enforce compliance. But Congress is in a different position; if the department head refuses to respond to its request, and is supported by the president in this attitude, it is helpless, unless it is willing to resort to the extreme expedient of impeachment. The Supreme Court has held, furthermore, that when the head of a department is required to give information, he may do so through subordinates, rather than in person.<sup>1</sup>

6. Serving  
on *ex-*  
*officio*  
boards

Finally, most heads of departments serve *ex-officio* as members of various supervising or coördinating boards and commissions. Thus the Federal Oil Conservation Board consists of the secretaries of war, navy, commerce, and the interior; and three of the seven members of the Board for Vocational Education are the secretaries of labor, agriculture, and commerce. In some instances, duties are only nominal, but in others there is important work to be done.

1. Depart-  
ment of  
State

The first executive department established after the constitution went into effect was a department of foreign affairs, continuing a department of that nature originally created by the Continental Congress in 1781. It soon became desirable, however, to assign to this department certain duties which had no relation to foreign affairs, and hence in less than two months the department was reorganized (September 15, 1789) as the Department of State; and this broader scope and title it has ever since borne. The department's main function is, and always has been, to manage, under the president's direction, the official dealings of the United States with foreign nations. But it also performs much of the work undertaken in other countries by a "home department" or ministry of the interior. Thus its head, the secretary of state, officially receives the laws of Congress, promulgates them, and files the

<sup>1</sup> *Miller v. Mayor of New York*, 109 U. S. 394 (1883).

original copies for preservation; keeps the great seal of the United States and affixes it to executive proclamations, to various commissions, and to warrants for the extradition of fugitives from justice; proclaims the admission of new states; transmits to the states constitutional amendments proposed by Congress, receives from the governors official notice of the action taken, and proclaims amendments which have been duly ratified; calls on the governors of the states, after a presidential election, for authentic lists of the electors chosen, and transmits the information to Congress; and renders various other services as required by law. After the creation of the Department of the Interior, in 1849, certain domestic functions formerly exercised by the State Department were transferred to the new branch, although not in some instances until after considerable delay. Patent administration was thus reassigned in 1849; the management of census-taking in 1850; the granting of copyrights in 1859; and supervision of territorial affairs in 1873. The department remains, however, to a considerable extent a home office, charged with keeping archives and proclaiming public acts, and with serving as a medium of communication between the president and Congress on the one hand and the authorities of the states on the other.

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"Home"  
functions

Our official spokesman in dealing with foreign nations is the president. He communicates the will of the United States to their governments and, with the consent of the Senate, negotiates treaties with them; he receives their ambassadors and ministers, whose official communications must be made to him, and never to the country at large through the newspapers or in other ways. We have seen that in the capacity of supreme director of foreign relations the president may speak to the world, or to a particular nation, through the medium of a message to Congress. Now and then he converses personally with representatives of foreign states who, by invitation or otherwise, call at the White House. And not so long ago we beheld President Wilson conducting foreign relations almost entirely from his own desk, and even going to Europe at the head of a commission charged with the negotiation of a great international settlement. Normally, however, the president acts in foreign affairs through the secretary of state and the subordinate officials of the State Department; and thus it comes about that that department—subject always to presidential check and control—negotiates treaties, carries on correspondence with foreign states, gives instructions to our ambassadors, ministers, and consuls

Conduct of  
foreign  
relations

abroad, attends to all matters of extradition, has charge of international tariff relations, issues passports, makes arrangements for international conferences and congresses, gathers information about conditions abroad and places it at the disposal of the president, of Congress, or, if suitable, of the public, and, in general, stands ready to take up any task, in peace or war, which the protection or promotion of American interests beyond our borders entails.<sup>1</sup>

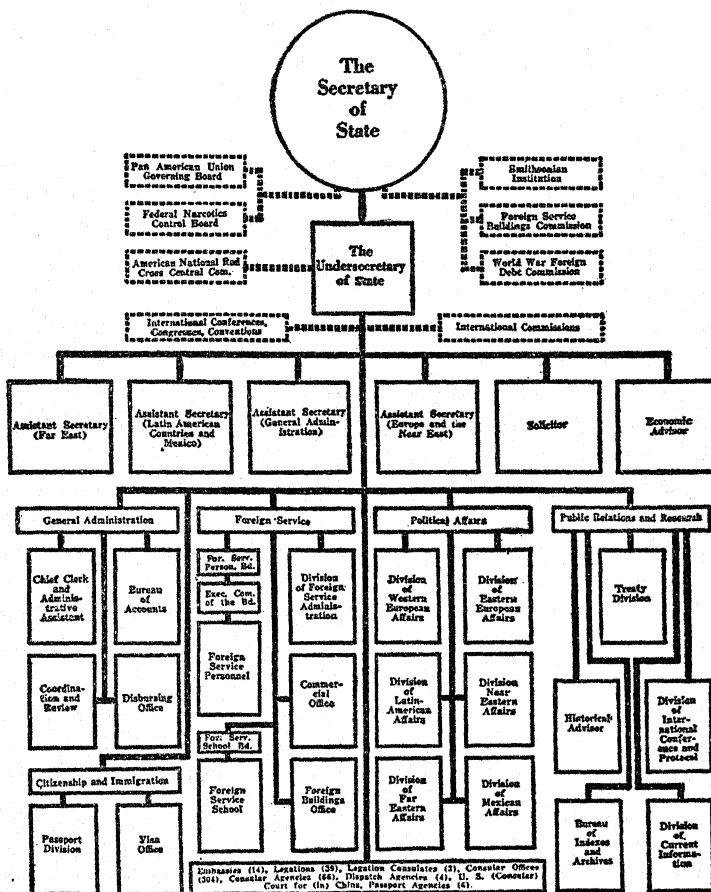
In personnel, the Department of State is the smallest of the ten. In the geographical sweep of its activities, however, it (taken in conjunction with the subsidiary field force, or "foreign service," which it directs) is the most extensive of all, being, indeed, the long arm by which the government reaches out to and deals with matters in the remotest lands beyond seas. Technically, the department itself is situated wholly in the national capital, where it has a force of some 625 officers and employees; the foreign service, with about 660 "career officers" and 1,700 clerical employees, has a separate status, and operates under a different set of regulations as to recruitment, salaries, and other matters. Something may therefore be said first about the department in the stricter sense, and later about the foreign service. The head of the department is, of course, the secretary of state—usually the most conspicuous cabinet officer, and in any event endowed with a certain primacy by statutory recognition as next after the vice-president in line of succession to the presidency. His is the oldest department, with functions of a more delicate nature than those of any other. Except on rare occasions when the president chooses to take foreign relations directly into his own hands (as did President Wilson during the war years 1917-19), the secretary of state is likely to sustain more intimate relations with his chief than does any other department head, and he alone among the ten makes no annual report that goes to Congress and to the public.<sup>2</sup> Not all secretaries of state have been great men or able administrators; comparatively few have brought to their office previous experience in diplomacy. The roster of incumbents since 1789 has, however, been adorned with enough honored

<sup>1</sup> It is to be noted, however, that most of the other nine departments have something to do with our foreign relations, *e.g.*, Commerce in connection with trade, and Labor in relation to immigration. All departments, indeed, except Interior and Justice maintain officials abroad, accredited, it is true, through the State Department, but instructed by and reporting to their own departments.

<sup>2</sup> Congress regards the State Department as in a peculiar sense the arm of the president. Requests made of it are viewed as being made of the president himself.

THE DEPARTMENT OF STATE

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names—Jefferson, John Quincy Adams, Clay, Webster, Seward, Blaine, Hay, Root, Hughes—to have invested the secretaryship, like the presidency itself, with a lofty tradition.

Next in rank to the department head is an under-secretary of state, who acts for his chief in matters which do not require the latter's personal attention, and temporarily assumes his full duties during periods of absence or incapacitation. Next come (a) a solicitor, who handles claims and other matters of a legal nature, (b) an economic adviser, and (c) four assistant secretaries, charged

2. Other  
officers  
and  
branches



with department and foreign service administration and with supervision of political, economic, and commercial activities. Of these assistant secretaries, one has to do with branches dealing with Asiatic relations, another with those concerned with European and Near Eastern relations, a third with those concerned with Latin America, and a fourth with branches devoted to general administration. Under this broad scheme, the political work of the department is divided among the six "divisions" of Far Eastern affairs, Western European affairs, Eastern European affairs, Near Eastern affairs, Latin American affairs, and Mexican affairs; while (a) foreign service administration is carried on by a division of that name, a foreign service personnel board, a commercial office, etc., (b) general administration, by a chief clerk's office, a bureau of accounts, a passport division, a visa office, etc., and (c) "public relations and research," chiefly by a treaty division, a bureau of indexes and archives, and a division of current information.

Interchange  
of depart-  
ment and  
foreign  
service  
officers

Under arrangements dating from 1924, ministers, consuls, and other persons belonging to the foreign service may be called to Washington to serve (not to exceed four years) as assistant secretaries or in other posts in which they can give the department the benefit of their first-hand experience abroad; and, similarly, higher department officials at Washington may be assigned to duty at foreign posts. Few assignments of the latter sort have as yet been made. In recent years, however, more than fifty foreign service officers have regularly been on duty in the department's Washington offices. The arrangement has its advantages, but is also disadvantageous in that legations, and even embassies, are sometimes left shorthanded, and also in that the returned foreign service officers, retaining their regular salaries, are often found receiving higher pay in the department than their superiors in rank. A fundamental weakness of the department is, indeed, the inadequacy of salaries, making it difficult to recruit for, or to retain in, the bureau headships and other such posts men of requisite experience and ability. Recent secretaries of state—notably Kellogg and Stimson—have appealed vigorously for larger appropriations, but thus far with only limited success. In the single year 1927-28, twenty-three per cent of the entire personnel resigned or in other ways withdrew from the department, betokening a morale leaving much to be desired.<sup>1</sup>

<sup>1</sup> The best account of the history and earlier organization of the State Department is G. Hunt, *The Department of State of the United States* (New

Turning to the foreign service, as distinguished from the department in the narrower sense, one finds that what is now a single establishment was formerly two, *i.e.*, the diplomatic and the consular. Each had not only its own functions but its own personnel, its own system of recruiting and promotion, its own classification, and its own salary scale; and, however much aptitude a member of one service might show for work of the kind performed by the other, it was almost impossible for him to be transferred. For many years the feeling grew that the wall separating the two services ought to be broken down, and after many bills on the subject had come to naught, a measure—the Rogers Act—approved by President Coolidge on May 24, 1924, accomplished the desired reform.<sup>1</sup> Diplomatic and consular services were consolidated in a common field force known as the “foreign service of the United States,” and the diplomatic and consular branches of this service were put on an interchangeable basis, so that transfers may be made from one to the other whenever found advantageous. New entrants into the service may be assigned, at the discretion of the president, to either the diplomatic or the consular branch.<sup>2</sup> Formerly, there was the difficulty, too, that salaries in the two services were not commensurate. Thus a consul-general of Class 1 received a salary of \$12,000 a year, while a counselor of embassy, the corresponding grade in the diplomatic service, received a salary of only \$4,000, which was the maximum for diplomatic officials below the rank of minister. Indeed, it was a matter of common knowledge that members of the

Haven, 1914). It is to be regretted that a projected series of similar volumes covering the remaining nine departments was abandoned during the World War. A reasonably up-to-date description will be found in J. M. Mathews, *American Foreign Relations: Conduct and Policies* (New York, 1928), Chap. XII. Cf. L. M. Short, *Development of National Administrative Organization in the United States*, Chaps. IV, XI. See also H. K. Norton, “Foreign Office Organization,” *Annals Amer. Acad. Polit. and Soc. Sci.*, CXLIII, Supp. (May, 1929); *idem*, “Handicapped Diplomacy,” *World's Work*, LVIII, 63-65; *idem*, “Our Neglected State Department,” *Century Mag.*, CXIV, 148-157 (June, 1927); W. T. Stone, “The Administration of the Department of State,” *Foreign Policy Assoc. Inform. Service*, IV, Supp. No. 3 (Feb., 1929); “N,” “Our Much Abused State Department,” *For. Aff.*, V, 567-578 (July, 1927); and T. Dennett, “The Publication Policy of the Department of State,” *ibid.*, VIII, 301-305 (Jan., 1930). The administration of foreign relations by secretaries of state down to and including Mr. Hughes is dealt with by various writers in S. F. Bemis [ed.], *The American Secretaries of State and Their Diplomacy*, 10 vols. (New York, 1927-29).

<sup>1</sup> T. Lay, “Foreign Service Reorganization,” *Amer. Polit. Sci. Rev.*, XVIII, 697-711 (Nov., 1924).

<sup>2</sup> The titles of secretary, counselor, consul, etc., through which the foreign status of members of the service is determined, remain as before. For purposes of administration and interchangeability only, the common title of “foreign service officer” is superimposed on the others.

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diplomatic service, whatever their station, could not expect to live on their salaries—which, of course, meant that, in effect, the service was closed to all persons not possessed of independent means. The act of 1924 dispensed with the rigid separate classifications and salary scales of the two services and set up an integrated scheme of nine classes—designated as first, second, third, etc.—and a uniform salary scale starting at \$3,000 and rising to \$9,000, with an unclassified, subordinate grade from \$3,000 downwards. The first class consists of a dozen or more counselors and secretaries of legations and embassies who hold the most important positions below the rank of minister, together with consuls-general and consuls stationed at the most important posts; the ninth class consists of the newcomers in both branches of the service.

Status of  
ministers  
and ambas-  
sadors

Ministers and ambassadors are not included in the classification. Their salaries range from \$10,000 to \$17,500—decidedly smaller amounts than are paid to officers of corresponding grade in the services of Great Britain and some other foreign countries. The legislation of 1924 was quite definitely aimed at making it possible for young men of ambition and ability to enter the foreign service as a career, but it left the salaries of ministers and ambassadors unchanged, so that even yet the higher grades of the service are practically barred to persons lacking independent means. Meagerness of salaries and failure to provide official residences for American representatives abroad have long stirred comment. In 1926, all but eighteen of our 347 consulates, legations, and embassies in foreign lands were established in rented quarters. An appropriation at that time of ten million dollars for the purchase or erection of suitable buildings has led to improvement; but a great deal remains to be done.

Appoint-  
ments: the  
merit  
system

In earlier days, appointments to diplomatic and consular positions, as to places of other kinds, were made by the president and Senate with no necessary regard for fitness. Personal favoritism and party services usually counted heavily. As early as 1895, President Cleveland introduced some beginnings of a merit system in the consular service, and in 1906 President Roosevelt instituted a plan of competitive examinations and efficiency ratings for the appointment and promotion of consuls of all grades, including consuls-general. In 1909, President Taft started a scheme of competitive examinations in the lower grades of the diplomatic service, with provision for efficiency records as a basis of promotion. This, however, did not affect the members of the service above the rank of

secretary, who, accordingly, seldom long outlived the administrations that appointed them, and rarely or never survived a change of the party in power. Furthermore, in both services the reforms rested until 1915 only on executive orders, not on statute. Here again the legislation of 1924 made notable advances. By its terms, all persons in the foreign service below the grade of minister are appointed only after examination and a suitable period of probation, and all are entitled to promotion on the basis of merit.<sup>1</sup> The positions of minister and ambassador are not included in the merit system; the president remains free to select men for these posts without reference to previous experience in the service. Many of the best students of the subject believe that this flexibility—this opportunity to choose the highest diplomatic officers from men of standing and achievement in all professions and fields—ought to be maintained. It is gratifying, however, to note that in recent years a steadily increasing proportion of ministerial and ambassadorial appointees have been selected from within the service. The act of 1924, indeed, requires the secretary of state to give the president from time to time the names of members of the service who have demonstrated their fitness for promotion to the grade of minister.

Taken in conjunction with increased allowances for traveling expenses, more liberal arrangements for leaves of absence, and the establishment of a retirement and disability fund for officers in the service<sup>2</sup> (all provided for in the act of 1924), the changes that have been described mark the greatest advance yet realized toward making the foreign service a career and raising it to a level such as it occupies in leading European countries, and such as the best opinion among our own people has long demanded. The consular service has been relatively well paid, and, on the whole, has of late been superior to any foreign system. But, speaking broadly, our diplomatic service has ranked low—manifestly because of small pay, lack of reasonable assurance of promotion, and the

The foreign  
service as  
a career

<sup>1</sup> The act provided for the establishment of a foreign service school in the State Department, in which appointees to the permanent foreign service are expected to receive one year of instruction. Most persons admitted to and completing the course receive field assignments as vice-consuls. See E. C. Stowell, "The Foreign Service School," *Amer. Jour. of Internat. Law*, XIX, 763-768 (Oct., 1925).

<sup>2</sup> This fund is created partly by a five per cent deduction from the basic salary of all foreign service officers eligible to retirement and partly by a contribution from the United States treasury. The age of retirement is sixty-five, and normally the beneficiary must have been in the service at least fifteen years.

dry rot of partisan influence. We have still some distance to go before we shall be on a par with Great Britain, France, Japan, and certain other states in this particular. But as now reorganized, our foreign service for the first time constitutes a profession in the same sense as the army and the navy. Though salaries are not what they should be, the service holds out real inducements to men of talent, regardless of their means. Even in the diplomatic branch, the secretarial officers are at least equal to those of foreign states. And in so far as our presidents henceforth follow the policy of filling ministerial and ambassadorial positions, not with political appointees, but with men who either have come up with distinction through the secretaryships, counselorships, and similar offices or have attained equally desirable qualifications by experience in other fields, an ancient ground of reproach will have been removed. Quite apart from whether we ever join the League of Nations—and irrespective of other foreign policies that we may or may not elect to pursue—the commanding position which we have taken since the war, economically and politically, and the ever-growing complexity of our relations abroad, demand not only an extensive but a strong foreign service. Appropriately enough, the foreign service has been termed our first line of defense.

The duties and activities of both diplomatic officers and consuls are of almost infinite variety; and the lack of any sharp line of demarcation between diplomatic and consular functions renders the amalgamation of the services, as described, the more logical. Briefly, the duties of diplomatic representatives are (a) to cultivate friendly relations with the authorities of the foreign state to which they are accredited, and to keep the way open for quiet and amicable adjustment of controversies; (b) to convey messages and inquiries from the home to the foreign government, and to transmit information and replies to the former; (c) to conduct official negotiations, including the drawing up of treaties; (d) to keep the secretary of state and president informed on political conditions abroad and on international developments; (e) to watch legislation and other public actions of the foreign state, and to make protests if treaty stipulations are violated; and (f) to be of general service to traveling Americans, in ways that often tax both ingenuity and patience.<sup>1</sup> Naturally, the stress of diplomatic work is far greater in some

<sup>1</sup> One of the best explanations of what it means to be an American ambassador to an important state is contained in B. J. Hendrick, *Life and Letters of Walter H. Page* (New York, 1923-24). See especially Vol. I, p. 159.

capitals than in others, and at times of international discord than in days of peaceful routine.<sup>1</sup>

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Consular  
activities

The primary function of the American consular officer, at least historically, is to promote the interests of American trade abroad; and to this end he observes and reports on economic conditions in his territory, watches for new and larger openings for American goods, sends back information on the most advantageous advertising and on the best methods of packing and shipping commodities, and puts himself at the service of the American manufacturer, shipper, or commercial traveler engaged in studying the foreign market on the spot. All of this, however, is only part of the story. Indeed, the tendency is for functions of these sorts to pass into the hands of the fast-growing commercial service maintained in foreign lands by the Department of Commerce, notably the commercial attachés and staffs connected with the principal legations; and it is not unlikely that in the course of time the consul will entirely cease to be a "trade promoter"—a development that would be doubly beneficial in that it would give him more time to attend to his other duties, and would relieve him of the present suspicion and hostility of business interests in the country in which he is stationed. The other duties which claim his attention are multifarious and steadily increasing. He certifies the invoices of goods intended for shipment to the United States, and otherwise assists in the administration of our tariff laws. He acts as paymaster of the American government abroad, and also as tax-collector, *e.g.*, in connection with the federal income tax. Under certain conditions, he cares for the estates of Americans who die abroad. He decides disputes between masters, officers, and men on American ships, provides for stranded seamen, and may discharge seamen from their contracts. He inspects and approves the passports of aliens intending to come to the United States, thus helping enforce our immigration laws.<sup>2</sup> He acts as "guide, philosopher, and friend" to traveling and necessitous fellow-countrymen. He serves as business agent in securing fuel and stores for American ships. And in one or two countries—chiefly China—where we retain extraterritorial rights, he hears

<sup>1</sup> Diplomatic service in general is described in J. W. Foster, *The Practice of Diplomacy* (Boston, 1906), Chaps. 1-x, and P. B. Potter, *Introduction to the Study of International Organization* (3rd ed., New York, 1928), Chap. VII. The diplomatic service of the United States as it stands to-day is dealt with in J. M. Mathews, *American Foreign Relations: Conduct and Policies*, Chaps. XIII-XIV.

<sup>2</sup> See pp. 591-594 below. It is interesting to note that receipts from passport and other fees very nearly cover the entire outlay on the State Department.

and decides civil and criminal cases in which American citizens are involved. The consul is less in the public eye than the minister or ambassador, but he penetrates corners of the earth where diplomacy never reaches and is easily the most useful type of general utility man that modern government and business have developed.<sup>1</sup>

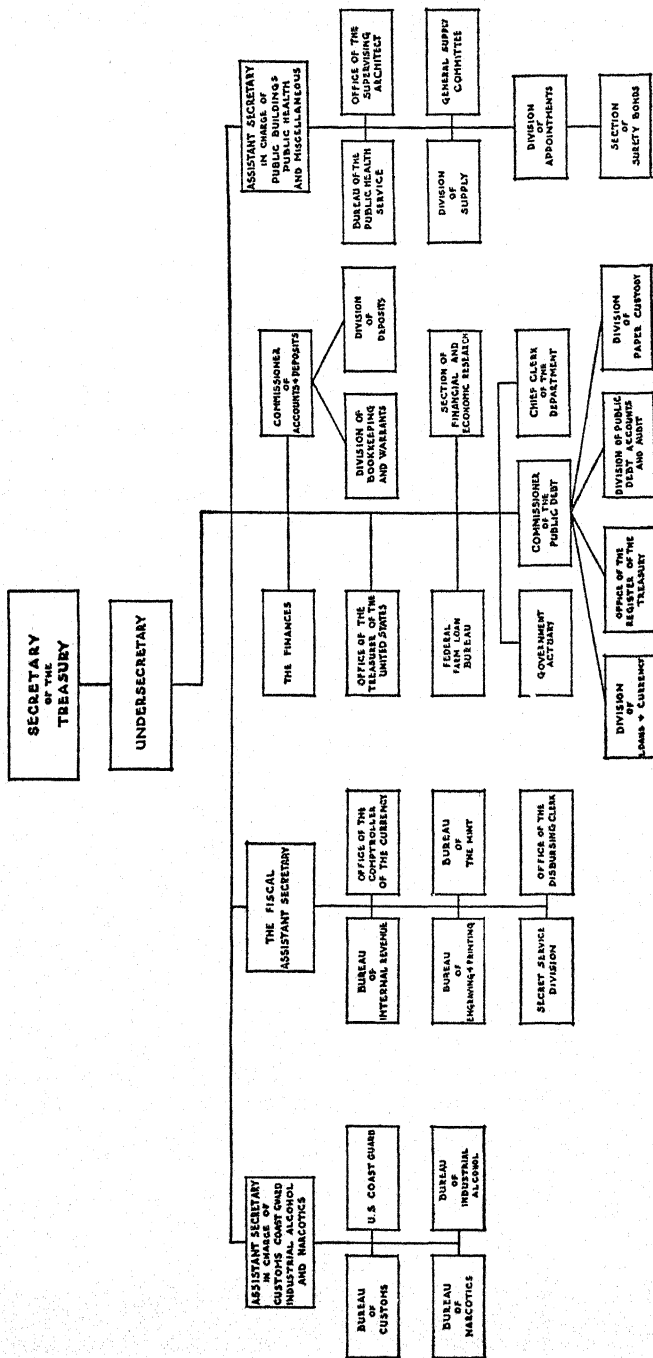
Under the Articles of Confederation, such limited financial administration as fell within the province of the national government was taken care of by a superintendent of finance—after 1784, by a treasury board. The vast volume of fiscal business destined to arise out of the financial powers (especially the power to tax) conferred in the constitution upon the new government set up in 1789 was not, of course, foreseen. Nevertheless, one of the first necessities was machinery for the collection of taxes, the custody of funds, and the keeping of accounts; and the creation of the Department of State was followed quickly by the establishment of a Department of the Treasury. As has been pointed out elsewhere, the organic statute creating this fiscal department does not use the term “executive;” it requires the head of the department to report directly to Congress, and hence on its face sets up a presumption against control of the department by the president. But we have also seen that Jackson claimed and exercised a directing voice in the work of this department no less than of the others, and that from his day onward there has been no real difference of status.<sup>2</sup> With the aid of his power of appointment and removal, the president can as readily control policy in the Treasury as in any other executive establishment.

Starting as a small organization, with highly integrated financial functions, the Treasury Department has developed into a huge administrative establishment, employing more people than any other except the Post-Office Department, and performing tasks, great and small, of amazingly varied character. From some 38,000 in 1917, the number of officers and employees rose to more than double that number during the period of our participation in the World War. The figure fell to 51,532 on June 30, 1927; but it has since increased somewhat; and unless the department’s activities should be very greatly curtailed, it will never return to the pre-war level. Even before 1917, the department was subject to exceptionally

<sup>1</sup> On the consular service, see J. M. Mathews, *American Foreign Relations: Conduct and Policies*, Chap. xvii; J. W. Foster, *Practice of Diplomacy*, Chap. xi; and P. B. Potter, “The Future of the Consular Office,” *Amer. Polit. Sci. Rev.*, XX, 284-298 (May, 1926).

<sup>2</sup> See p. 279 above.

# THE TREASURY DEPARTMENT



Reproduced from Annual Report of the Secretary of the Treasury for the Fiscal Year Ending June 30, 1930, p. xxvi.



frequent internal reorganization. During the war, there were naturally many changes, and in more recent years there have been at least two extensive redistributions. Under the last of these, carried out by order of the head of the department in 1923, supervision of the administrative units is apportioned among an under-secretary (with five assistants) and three assistant secretaries, one of the latter being in charge of fiscal offices, one in charge of public buildings, public health, and miscellaneous activities, and one in charge of the coast guard and the bureaus of customs, narcotics, and industrial alcohol. The under-secretary acts for, and by direction of, the secretary in any branch of the department and represents him in dealings with sundry outside agencies such as the Federal Reserve Board.

Financial  
functions:

The work of the department falls into two general categories, one financial and the other non-financial. The first important financial activity is the collection of the national revenues. The principal sources of revenue and their yield will be explained in a later chapter.<sup>1</sup> Suffice it to say here that practically all income of the national government, except from the postal service, is gathered by two great branches of the Treasury Department, namely, the customs service and the bureau of internal revenue. The customs service collects the duties on imports provided for by the tariff laws, amounting now to around six hundred million dollars a year.<sup>2</sup> The work is performed at some three hundred "ports of entry," grouped in forty-eight customs collection districts; and a large staff of collectors, surveyors, and appraisers is required. A customs bureau in the Treasury Department is in immediate charge of a commissioner of customs, supervised by one of the assistant secretaries. The internal revenue service collects the federal income tax, estate taxes, capital stock taxes, occupational taxes, tobacco taxes, amusement taxes, and sundry other imposts, aggregating considerably more than half of the total national income. For internal revenue purposes, the country is divided into sixty-four districts, each in charge of a collector, with the requisite staff of revenue agents and other assistants. The central organization in Washington is presided over by a commissioner of internal revenue, whose immediate superior is the fiscal assistant secretary.<sup>3</sup>

(1) Collec-  
tion of  
revenue

<sup>1</sup> Chap. xxv below.

<sup>2</sup> L. F. Schmeckebier, "The Customs Service," *Service Monographs of the U. S. Government*, No. 33 (Baltimore, 1924).

<sup>3</sup> L. F. Schmeckebier and F. X. A. Eble, "The Bureau of Internal Revenue," *Service Monographs*, No. 25 (Baltimore, 1923).

A second main financial function of the department is keeping the government's money and paying its bills in accordance with appropriations duly made. There is a treasury (in the physical sense) in Washington, in whose vaults large sums are held; and until 1921 there were sub-treasuries in nine other principal cities. Government money has also long been placed in banks; and since the discontinuance of the sub-treasuries most of it is so deposited, principally in the federal reserve banks located in twelve cities carefully chosen with reference to the needs of business.<sup>1</sup> The treasurer of the United States is in general charge.

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(2) Custody of funds

A third important financial function is the control of the currency. The bureau of engraving and printing prepares all the paper money, as well as the bonds and other securities, of the national government;<sup>2</sup> the bureau of the mint supervises the mints, where the coined money is produced, and the assay offices;<sup>3</sup> the bureau of secret service guards the currency against counterfeiting; the comptroller of the currency supervises the national banks, directs the periodic examinations of them and receives their reports, and prepares and issues the national bank circulation.<sup>4</sup>

(3) Control of the currency

Early in its history, the Treasury Department began to be assigned functions which had little or nothing to do with finance, and for a long time it served as a dumping ground for offices and activities which Congress did not know how to dispose of otherwise. Until 1829, it supervised the postal service; from 1812 to 1849, it contained the general land office; numerous duties pertaining broadly to commerce were imposed on it until, in 1903, the Department of Commerce and Labor was created. Various special and non-financial tasks fell to it during the period of the World War; and a prohibition bureau, created from a prohibition unit of the bureau of internal revenue, and charged with enforcement of the Volstead Act, formed a branch of the department from 1927 until transferred to the Department of Justice in 1930. Even yet, the Treasury's activities are more varied than those of most other departments. The bureau of the public health service frames and

Non-financial functions

<sup>1</sup> See p. 577 below.

<sup>2</sup> L. F. Schmeckebier, "The Bureau of Engraving and Printing," *Service Monographs*, No. 56 (Baltimore, 1929).

<sup>3</sup> J. P. Watson, "The Bureau of the Mint," *Service Monographs*, No. 37 (Baltimore, 1926).

<sup>4</sup> J. G. Heinberg, "The Office of the Comptroller of the Currency," *Service Monographs*, No. 38 (Baltimore, 1926).

Two independent financial establishments—the general accounting office and the bureau of the budget—are dealt with in a later chapter (see pp. 565-569 below).

enforces regulations for the prevention of the introduction and spread of communicable diseases, supervises the national quarantine service, and carries on scientific research in public health and hygiene.<sup>1</sup> The supervising architect superintends the construction and repair of public buildings. The coast guard renders assistance to vessels in distress, and destroys or removes wrecks, derelicts, and other floating dangers to navigation. A bureau of narcotics, superseding a federal narcotics control board, was created in 1930 and charged with enforcement of anti-narcotic laws. And a bureau of industrial alcohol, also dating from 1930, is a remnant of the former prohibition bureau.<sup>2</sup>

Following approximately the chronological order of establishment, the next two departments are those having to do with the fighting services, *i.e.*, the War Department and the Navy Department. The War Department dates from 1789.<sup>3</sup> Its primary function is, of course, the management of affairs pertaining to the army. Through various bureaus, it sees to the enlistment and equipment of men for all branches of the service, provides munitions, contracts for supplies, transports troops, erects and mans coast defenses and other fortifications, supervises the militia, protects the health of the soldiers, and directs the training of young men at the National Military Academy at West Point. The department has two assistant secretaries (one in charge of military aviation), and is organized in five divisions and eleven military bureaus; although changes are frequent, especially in time of war. As in Great Britain, but not always in Continental states, the head of the department is a civilian, not a military man. He is therefore selected as a general administrator, not as an expert on military affairs; and for guidance in the technical work of the department he is supposed to rely on the military officers in the various bureaus, and especially on the General Staff, created in 1903 to prepare plans for national defense and for the mobili-

<sup>1</sup> L. F. Schmeckebier, "The Public Health Service," *Service Monographs*, No. 10 (Baltimore, 1923); R. D. Leigh, *Federal Health Administration in the United States* (New York, 1927).

<sup>2</sup> The history of the Treasury Department is treated fully in L. M. Short, *Development of National Administrative Organization in the United States*, Chaps. vi, xii. Cf. J. A. Fairlie, *National Administration of the United States* (New York, 1905), 92-132. On the activities of the department, see *Annual Report of the Secretary of the Treasury on the State of the Finances*.

<sup>3</sup> There was a similar department during the period of the Confederation, and Washington made its chief, General Henry Knox, the first head of the new department under the constitution.

zation of the troops, to suggest improvements in the military establishment, and to give professional advice to the secretary of war and to the president as commander-in-chief. Ultimate civil control over all the activities of the department is secured by constitutional provisions making it impossible to raise forces or spend money except by authority of Congress.

Having no dangerous neighbors on her borders, and being remote from the scenes of Old World conflicts, the United States has always maintained a relatively small standing army. Entrance into world politics in a more active way after 1898 led to some increase of the forces; but even in 1915 the authorized strength of the "regular army" was only 98,000 officers and men. The extraordinary effort of the World War brought under arms a total of more than 3,700,000 (including the marines). But after the armistice, the number was rapidly reduced again, so that on June 30, 1930, the actual strength of the regular army stood at 13,344 commissioned officers and 124,301 enlisted men—a total of 137,645. This force is, in peace times, recruited from volunteers, serving for one year or three years at their option, and is officered chiefly by graduates of the Military Academy at West Point.

The  
armed  
forces

Under terms of the Army Organization Act of June 4, 1920, the military forces of the country include, in addition to the regular army, (1) the National Guard—once known as the "militia"—and (2) the Organized Reserves. The National Guard, as organized in each of the states and territories and the District of Columbia, consists of volunteers enlisted for three years. Locally appointed officers are in immediate charge, but national standards are prescribed and enforced, the officers and men are paid out of the national treasury, and they are liable to be called at any time into national service.<sup>1</sup> The Organized Reserves consists of a reserve corps of enlisted men, and also an officers' reserve corps whose members receive their training principally while students in colleges and universities and at summer encampments held annually under the direction of the War Department. Unlike the National Guard, which belongs partly to the states and partly to the national government, the Organized Reserves is a purely national force. In a war of any magnitude, it would constitute the major component of the effective army. The members have a war obligation only. In time of peace, they may be called out for

<sup>1</sup> The total strength of the National Guard on June 30, 1930, was 182,715. There is, in addition, a National Guard Reserve.

training, but not for longer than fifteen days a year except with their own consent. The theory of the arrangement is that the war force, over and above the standing army, required for immediate mobilization in the event of emergency, is to be set up and trained in time of peace, and composed of qualified persons who have enlisted voluntarily.

Until 1798, the War Department administered naval affairs, and until 1849, Indian affairs; and it has to-day two important functions of a non-military character, *i.e.*, the construction of public works and the administration of the insular possessions. Under a chief engineer, the corps of engineers dredges and improves rivers and harbors, builds dams and reservoirs required in the reclamation of arid lands, and carries out any other engineering projects which Congress authorizes, the most notable as yet being the building of the Panama Canal. All navigable waters of the United States are under the War Department's jurisdiction, and no bridge, pier, or other possible obstruction to navigation may be erected until the department's consent has been obtained.

European nations which possess outlying dependencies invariably have a ministry of colonies. The United States, however, has never established such a department, and the administration of territorial, or colonial, affairs has been variously assigned to the departments of State, War, Navy, and Interior. At present, Alaska, Hawaii and the Virgin Islands are supervised by the Department of the Interior; the Philippines, Porto Rico, and the Panama Canal Zone, by the War Department; and certain minor possessions by the Navy Department. The bureau of insular affairs was organized in the War Department in 1898 to take charge of matters of civil government in the islands acquired from Spain;<sup>1</sup> and nowadays it receives the reports of the governors and other authorities, audits the insular accounts, purchases and transports supplies for the insular governments, and has charge of appointments in the United States to the Philippine civil service.<sup>2</sup>

The Navy Department was created in 1798, at the time of the threatened war with France. Unlike most other departments, it

<sup>1</sup> This bureau was at first known as the division of customs and insular affairs. It became the division of insular affairs in 1900, and the bureau of insular affairs in 1902.

<sup>2</sup> H. B. Learned, *The President's Cabinet*, Chap. i. On the history of the War Department, see L. M. Short, *Development of National Administrative Organization in the United States*, Chaps. v, xii. For current statistics and other information, see *Annual Report of the Secretary of War*.

has always had but one important function and, accordingly, an unusually unified, symmetrical organization. Its various activities—the construction and upkeep of war craft, the enlistment of men, the manufacture or purchase of arms and equipment, the making of contracts for supplies, the organization and movement of the fleets, the control of naval hospitals and hospital ships, and other work connected with keeping the fighting forces on sea at their maximum efficiency—are carried on through about a dozen coördinate bureaus; and the department head, being, as in the case of the secretary of war, a civilian, is advised by a general board consisting of important naval officers, and by certain other more specialized boards. By somewhat logical arrangement, the department administers the affairs of Tutuila (in Samoa) and Guam, whose importance consists chiefly in their serviceableness as naval stations. It also has charge of the Naval Academy at Annapolis and the Naval War College at Newport.

CHAP.  
XVII

Physically, the navy consists of battleships, cruisers, submarines, and various kinds of auxiliary craft provided for by act of Congress. The end of the World War found the United States with a great navy afloat, a still more powerful one on the stocks in the course of building, and the scepter of sea supremacy within her grasp. At the Washington Conference on the Limitation of Armaments, in 1921-22, however, the leading naval powers agreed that until 1936 there should be a fixed ratio in capital ships which places the United States simply on an equality with Great Britain;<sup>1</sup> and Congress now authorizes building subject to this understanding.

The naval  
forces

The enlisted men of the navy are volunteers and the officers are mainly graduates of the Naval Academy. An important subsidiary, dating, indeed, from 1775, is the Marine Corps, organized to supply the navy with trained infantry for land fighting or other duty. This interesting, and even picturesque, force is held in readiness to be dispatched, in detachments, at any time to any part of the world where Americans are to be protected, disorders suppressed, or patrol duties performed. Detachments have been used repeatedly in recent times in the Caribbean countries and in the Far East; while in the World War—from Belleau Wood onward—the corps, recruited to an emergency strength of almost eighty thousand, rendered valiant service. The actual strength of

<sup>1</sup> For every five battleships possessed by the United States, Great Britain is allowed five, Japan three, and France and Italy approximately two each.

the navy at the opening of 1930 was 5,458 line officers, 84,000 enlisted men, and 18,000 marines.<sup>1</sup>

During the World War and after, aviation became a major phase of offensive and defensive plans and operations, and in our own country important air services have been built up in connection with the army, the navy, and also the postal establishment. In 1930, there were 13,305 officers and men in the army air service and 11,788 in the naval air service. An *ex-officio* aëronautical board has been set up to promote coöperation and coördination between the two services. Each service, however, is administered independently in a bureau of the department to which it is attached; and proposals to consolidate army, naval, and postal aircraft activities in a new executive department of aëronautics, on the plan of the British and French air ministries, have been regarded very unfavorably by department heads and by the president. It may be added that a proposal for consolidation of the War and Navy departments into a single department of defense—a step actually taken in the Kingdom of the Netherlands in 1928, and recommended for the United States in most of the important pending plans for executive reorganization—has been viewed similarly in army and navy circles, on the ground that the small economies effected in time of peace would not compensate for the loss of mobility and dispatch in time of war. There is, however, an army and navy joint board which advises the heads of the two departments upon matters having to do with coördination of the defense services.

Following English and colonial precedent, Congress provided in the Judiciary Act of 1789 for an attorney-general who should advise the government on legal matters and represent it in judicial proceedings. This officer was not expected to give all of his time to the work, and he was not made the head of a department, although as soon as the cabinet developed he became a member of the group. With the growth of the country and of the government's activities, the duties of the position naturally increased. Solicitors and other assistants were provided for; the attorney-general gave up all private practice; and at last, in 1870, under pressure of the great volume of legal work flowing from the Civil War and Reconstruction, Congress belatedly established a Depart-

<sup>1</sup> L. M. Short, *Development of National Administrative Organization in the United States*, Chaps. VII, XIV.

ment of Justice in which the government's legal business was for the first time concentrated and systematized. In number of officers and employees, the Department of Justice is smaller than most others. But it performs exceedingly important functions, and no department, except perhaps the Treasury, is so interlocked with the others. The principal officers in Washington are the attorney-general, who gives his time mainly to studying and rendering opinions on legal questions referred to him by the president or heads of departments; a solicitor-general, who represents the United States before the courts; an assistant to the attorney-general, who has special charge of cases arising out of the national anti-trust and interstate commerce laws; seven assistant attorneys-general, with such duties as are assigned to them by the head of the department; solicitors for the departments of State, Treasury, Commerce, and Labor;<sup>1</sup> a director of the bureau of investigation, whose activities parallel and supplement those of the secret service in the Treasury; and a chief of the division of identification and information, charged with collecting, compiling, and distributing crime reports.

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XVII

Officers  
in Wash-  
ington

Outside of Washington, the department has a district attorney and a marshal in each of the eighty-four judicial districts into which the country is divided, besides others in Alaska, Hawaii, Porto Rico, and the Panama Canal Zone. Both offices date from 1789. The attorneys represent the United States in suits brought in the district courts, to which the United States is a party, and prosecute violators of national laws; the marshals serve writs, summon jurors, protect judges against violence, and execute court orders and decisions. All are appointed by the president and Senate for a term of four years. There are assistant attorneys and deputy marshals, and private legal aid is sometimes employed. The work of this field force of the department is, of course, supervised from Washington, and, in the nature of things, rather more closely than the outlying services in certain of the other departments.<sup>2</sup>

Field  
force

<sup>1</sup> These solicitors and their staffs are officially in the Department of Justice, although they do no work for it. A bill which would have removed them to the departments which they respectively serve—as the solicitor for the Post-Office Department was removed in 1923—failed in 1925. The office of solicitor for the Interior Department was discontinued by legislation of 1926.

<sup>2</sup> It should be emphasized that the Department of Justice and the judiciary are quite separate. The former has nothing to do, legally, with the creation of courts, the appointment or removal of judges, or the regulation of judicial procedure.



CHAP.  
XVIIPrincipal  
functions

Two main duties fall to the officials of this department. The first is to give opinions to the president and the other principal officers of the government on questions touching their duties and involving construction of the constitution or the laws. The courts will answer such questions only in deciding actual cases, and cannot be looked to for advisory opinions on constitutional and legal matters coming up almost daily in the carrying on of the government's work. For these, the officials concerned are dependent upon the attorney-general and his principal assistants. In many instances, the opinions rendered prove final and conclusive, and hence determine the law; and sometimes they profoundly influence the political, as distinguished from the purely legal, policies of the government. Opinions are published, after the manner of judicial decisions, and acquire weight as precedents in a similar way. They are not furnished to Congress or its committees, but only to the executive authorities; nor are mere departmental regulations ruled upon, or abstract or hypothetical questions answered.

The second main duty of the department is to supervise or conduct suits to which the United States is a party and to prosecute offenders against the revenue, currency, commerce, banking, postal, and other national laws. Suits begun by the government are brought before a district court or the Supreme Court, according to the nature of the case; and while suits against the government are not allowed as a matter of right, they are in fact permitted, and are instituted in a district court, or in the special Court of Claims. In the lower courts, the government, whether plaintiff or defendant, is commonly represented by the district attorney of the district in which the action is begun; in the Supreme Court and Court of Claims, by the attorney-general or one of his principal assistants, usually the solicitor-general, or, in trust cases, the assistant to the attorney-general.

Other  
functions

The department found its labors greatly increased after 1930 by the transfer, early in that year, of the prohibition bureau from the Treasury Department to the Department of Justice. The change was made on recommendation of the National Commission on Law Observance and Enforcement, and at the urgent request of President Hoover, and was designed to tone up the administration of a body of law peculiarly difficult of enforcement by combining the detecting agencies of the government with the prosecuting agencies. The transfer involved shifting some 2,500

employees.<sup>1</sup> Two minor, although not unimportant, functions of the department are the advising of the president on requests for pardons<sup>2</sup> and the administration of the federal penitentiaries at Atlanta, Leavenworth, and McNeil Island, and of the jail and reform schools in the District of Columbia.<sup>3</sup>

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XVII

Although nation-wide postal establishments operated by government authorities do not go back very far historically, the services rendered by such agencies are nowadays considered prime necessities; and the postal system of the United States has become, not only the most extensive in the world, but probably the largest business enterprise in which any government has ever been directly concerned. The Post-Office Department, by which this system is administered, came into existence in a roundabout way. It was not recognized by statute as a coördinate executive department until 1874. But to all intents and purposes it enjoyed that status from 1825, when the term "Post-Office Department" was first used in the title of an act of Congress; and even more definitely from 1829, when, on the initiative of President Jackson, the postmaster-general became a member of the cabinet. The postal establishment, however, was an inheritance from earlier times. The colonies had local postal systems and something of a general system as well;<sup>4</sup> there was a general post-office under the Confederation; and after 1789 a post-office establishment, under a postmaster-general, was, as a branch of the revenue, attached to the Treasury Department. This last arrangement followed the practice in Great Britain, where, to this day, the postal system, being officially regarded as a revenue-producing enterprise, is organized and administered as a branch of the Treasury.

6. Post-  
Office De-  
partment

<sup>1</sup> L. F. Schmeckebier, "The Bureau of Prohibition," *Service Monographs*, No. 57 (Baltimore, 1929). The statutes to be enforced are brought together conveniently in *National Prohibition Enforcement Laws* (Washington, Govt. Printing Office, 1930).

<sup>2</sup> See p. 271 above.

<sup>3</sup> On the attorney-generalship, see H. B. Learned, *The President's Cabinet*, Chap. vii, and L. M. Short, *Development of National Administrative Organization in the United States*, 184-195; and on the Department of Justice in general, Short, *op. cit.*, Chap. xv; W. F. Willoughby, *Principles of Judicial Administration* (Washington, 1929), Chap. x; and A. Langeluttig, *The Department of Justice of the United States* (Baltimore, 1927). An interesting popular account is J. M. Beck, "The World's Largest Law Office," *Amer. Bar Assoc. Jour.*, X, 340-342 (May, 1924).

<sup>4</sup> Benjamin Franklin really laid the foundations of our postal system when he was deputy postmaster-general of the colonies during the twenty years before the Revolution, and also postmaster-general in 1775-76.

CHAP.  
XVIIGrowth of  
the postal  
service

A person desiring to portray the amazing development of the United States in the past hundred and forty years could hardly do so more effectively than in terms of the growth of the postal system. He could cite the fifty thousand post-offices and nearly forty-four thousand rural delivery routes now in operation, serving twenty-five million people; the receipts of \$705,500,000 in 1930, compared with \$280,000 in 1800; the million and a half letters mailed every hour of the day from one end of the year to the other; the eighteen billion pieces of mail handled in a year; the 317,000 employees, comprising more than half of the entire executive civil service. But even more striking would be the facts relating to the expansion of functions and activities which has made the Post-Office the department whose operations come closest home to the great mass of the people. High points in the recital would be the introduction of the registration system in 1855, the beginning of urban free delivery service in 1863, the establishment of the money order system in 1864, the beginning of rural free delivery service in 1896, the introduction of the postal-savings system in 1911, the starting of the parcel-post system in 1913, and the launching of an air mail service—nowadays including service to a number of foreign countries—in 1918.

Postal  
savings

A word only can be said about two or three of the services most recently undertaken. The introduction of the postal-savings system in 1911 followed prolonged agitation in favor of a plan under which savings could be deposited at designated post-offices and draw interest at a moderate rate. The arguments advanced were chiefly that large sections of the country were insufficiently equipped with savings banks; that extensive use of postal-savings banks would be made by the foreign-born, who had been accustomed to such institutions in Europe and were distrustful of our ordinary banks; that the postal-savings banks could be utilized to provide a market for United States bonds; and that their existence would promote thrifty habits among the masses. Experience has amply demonstrated the wisdom of the experiment. Beginning modestly in 1911, the system was extended within a decade to practically all parts of the country; on June 30, 1930, postal-savings deposits were being received at 6,795 depositories, and there were 466,401 depositors, with deposits and accrued interest aggregating \$179,847,626. Deposits are received in as small amounts as one dollar, and may be made in such sums as will not yield a balance exceeding \$2,500 per person at any one time; and interest is paid at a rate

of two per cent.<sup>1</sup> Deposits, too, are exchangeable for postal-savings bonds in denominations of twenty dollars and upwards, bearing interest at two and one-half per cent, which may be held in any amount.

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XVII

After prolonged opposition on the part of the great express companies and small retailers, Congress, in 1912, passed an act which authorized the Post-Office Department to engage in the express business; and this new service was launched in 1913 as the parcel-post system. During the first year, more than four hundred million parcels were handled, and the annual business has now been multiplied several fold. The service is perhaps of largest benefit to the millions of people living in outlying agricultural districts, though few individuals or business establishments fail to make more or less continuous use of it. In addition to the domestic parcel post, the United States has international parcel-post agreements with most of the nations of the world.

Parcel  
post

By all odds the most noteworthy of recent postal developments has been the building up of an extensive and rapidly growing air mail service. After considerable study and a number of occasional flights with mail by exhibition aviators, a regular service between Washington and New York was opened in 1918. In 1919, this was extended to include New York-to-Cleveland and Cleveland-to-Chicago routes; in 1920, increased appropriations permitted extensions *via* Chicago to Minneapolis, Omaha, St. Louis, and eventually San Francisco; and, in response to steadily growing public demand, other lines were opened in succeeding years. In 1927, the postal authorities began letting air-mail contracts to private commercial corporations, and government operation of the lines came to an end. In 1929, thirty-two routes were open, giving service to all major cities of the country and to large numbers of lesser ones.

Air mail  
service

The Post-Office Department is administered by a postmaster-general, who, for obvious reasons, is often selected with a view to his experience in managing a great business, *e.g.*, John Wanamaker; or, at all events, in conducting large enterprises, not excluding, as in the case of Will H. Hays, national political campaigns. Each of four assistant postmasters-general has charge of a branch of the department, which in turn is organized in divisions under superintendents or chiefs; and there are other general departmental

Depart-  
mental or-  
ganization

<sup>1</sup> Indeed, amounts less than one dollar may be saved by purchasing postal-savings stamps at ten cents each. Successive postmasters-general have recommended that the maximum balance allowed be increased from \$2,500 to \$5,000.

officers, including the usual chief clerk, a solicitor, and a comptroller. The bulk of the department's work is done, of course, throughout the country, in collecting, assorting, transporting, and delivering mail (including parcels of merchandise), receiving and caring for savings, transferring money under the money-order system, and enforcing the laws against lottery schemes and swindlers. Extension of rural delivery service to large parts of the country has made possible the abandonment of thousands of small post-offices. Nevertheless, the total number on June 30, 1930, was 49,063.<sup>1</sup> These are divided into four classes, according to annual receipts, the fourth class including all whose receipts are under \$1,500, or about sixty-eight per cent of the total number. All fourth-class postmasters, together with the great body of lesser employees of other types, are now included in the classified competitive service. Postmasters of the other three classes, numbering 15,659 on June 30, 1930, are still appointed by the president and Senate, with such restraints upon political and other undesirable appointments as flow from a system of tests employed voluntarily by the president in selecting nominees.<sup>2</sup>

The  
problem of  
deficits

It has been stated that the postal establishment was at one time thought of as a revenue-producing agency, as it still is in Great Britain. That notion, however, was long ago given up. For a hundred years, the most that was attempted was to make the service pay its way, and during long stretches of time—indeed, almost continuously between 1830 and 1910—it failed to do even that. When the United States entered the World War, in 1917, postal rates were, indeed, deliberately pushed up to such a level as to yield the government a clear profit. But they were lowered again, in 1919, as soon as the emergency passed; and deficits promptly reappeared. During the fiscal year ending June 30, 1930, expenditures exceeded revenues by more than ninety-eight million dollars, and losses were incurred on nearly every branch of the service. An item of such size may not be overlooked even in a country with as gigantic a budget as ours, and successive presidents and postmasters-general have struggled with the problem and suggested solutions. One cause of the difficulty—though only a minor one—

<sup>1</sup> The maximum number, reached in 1901, was 76,945.

<sup>2</sup> See p. 395 below. On the postmaster-generalship and the organization of the department, see L. M. Short, *Development of National Administrative Organization in the United States*, Chaps. viii, xvi, and H. B. Learned, *The President's Cabinet*, Chap. ix. The postmaster-general is the only department head who has a fixed term, i.e., four years; all others remain in office at the will of the president.

is the dead loss arising from the handling of "franked" matter, chiefly printed speeches and other materials sent out by members of Congress to their constituents. Another is the necessity of maintaining service over large rural areas where the costs entailed are bound to be out of all proportion to the returns. A third is the financial sacrifice involved in awarding mail contracts, as required by law, to American shipping companies on the basis of speed and mileage rather than that of poundage. Still another is successive increases of compensation of postal employees, offsetting such enlarged postal appropriations as Congress has seen fit to make. Finally may be mentioned deliberate sacrifices of returns entailed by legislation authorizing specially low rates on educational, scientific, religious, and fraternal publications, free distribution of country newspapers within the county of publication, and free carriage of books, pamphlets, and other reading matter in raised characters for the use of the blind.

Many of the policies enumerated are aimed at promoting the public well-being. On that ground, they may be, and probably are, entirely defensible. A business run on such lines cannot, however, be expected to make ends meet; and while something can be gained by new economies, and especially by increasing postal rates (even on first-class matter, as recommended by the postmaster-general in 1930<sup>1</sup>), it may be doubted whether a government service of the nature of the postal establishment, in a country of continental proportions, really ought to be expected to pay its way in the literal sense of bringing in as much in dollars and cents as is spent on it. Such expectation would be reasonable only if the post-office were purely a business institution, free to cut off—as a private corporation would do—any branch or service that proved incapable of being made self-sustaining. A postal service ministering to a twentieth-century civilization cannot, however, be conducted on the plan of a chain store or a motor plant.<sup>2</sup>

<sup>1</sup> *Annual Report*, 3-6.

<sup>2</sup> A. C. Collins, "Shrinking the Postal Deficit," *World's Work*, LIX, 73-75 (Jan., 1930). In February, 1931, President Hoover announced that he would ask Congress to authorize the appointment of a commission to investigate methods of putting the postal service on a "paying basis." The announcement followed the president's approval of a measure providing for a forty-four-hour week for about 150,000 post-office clerks, letter carriers, and railway service men; and the magnitude of current postal deficits was ascribed largely to successive increases of pay of postal employees and reductions in hours of service.

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## CHAPTER XVIII

### NEWER DEPARTMENTS, INDEPENDENT ESTABLISHMENTS, AND PROBLEMS OF ADMINISTRATIVE REORGANIZATION

Gouverneur Morris proposed in the constitutional convention of 1787 that the principal officers of the national government should include a "secretary of domestic affairs," who should "attend to matters of general policy, the state of agriculture and manufactures, the opening of roads and navigations, and the facilitating of communications through the United States." Curiously enough, practically all of these functions are now performed elsewhere than in the "home" department which the Pennsylvania statesman had in mind. They and others of the kind have, however, made necessary the creation in later days of not only the proposed home department, but three other departments having to do specially with agriculture, commerce, and labor, not to speak of numerous independent boards and commissions.

7. Interior  
Department

Efforts were made to bring about the creation of a home, or interior, department by the first Congress in 1789. It was decided, however, not to set up a separate department of the kind, but instead to turn over such duties as would have been appropriate to it to the Department of Foreign Affairs, which, as we have seen, was thereupon rechristened "Department of State;" and other such functions were subsequently assigned, with no particular logic, to the Treasury Department and the War Department. In the course of a generation, the expansion of the country and the growth of governmental activities made a new department highly desirable. Not until 1849, however, after the need had been freshly emphasized by the annexation of vast stretches of former Mexican territory, could the necessary legislation be obtained; and even then Calhoun and other southern men strongly opposed the step, on the ground that it would lead to encroachment by the national government upon the powers held to be reserved to the states. President Polk signed the bill, but confided to his diary that he had done so with reluctance, fearing its "consolidating tendency."<sup>1</sup>

Establish-  
ment in  
1849

<sup>1</sup> One frequently hears nowadays the same objection to the proposal to establish a national department of education, or of education and health. The



CHAP.  
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ganization

The organic act did not expressly provide that the secretary of the interior should be subject to the direction of the president; in that respect it resembled the measures creating the Treasury Department and the attorney-generalship. And under normal conditions the president will follow more closely the work of departments having to do with foreign relations, national defense, and finance. Of the full validity of presidential control over the affairs of the Interior Department, however, there is not a shadow of doubt. There are two assistant secretaries, each in charge of a group of bureaus and offices, of which there are nine of principal importance, in addition to two executive assistants, an administrative assistant, a solicitor, and certain other officials. As in the Treasury Department, chiefs of major subdivisions enjoy an exceptional degree of independence, being subject only to supervisory and appellate powers of the department head.<sup>1</sup> For a number of years, however, a reorganization of the department has been in progress, resulting not only in substantial economies, but in better coördination and increased efficiency; and further significant changes are in prospect.

## Functions

In many European countries, notably France, the ministry of the interior is charged mainly with the supervision of local government and administration. In the United States, this function falls to the several state governments, and the national Interior Department takes care, rather, of a varied assortment of interests and activities which, in most cases, have little or no relation to the work of state and local authorities. One may add that these interests and activities, by reason of their great diversity, often have, and must have, little or no relation to one another. Four main administrative agencies were transferred to the department when it was established, *i.e.*, the general land office from the Treasury Department, the patent office from the State Department, and the pension office and office of Indian affairs from the War Department. A bureau of education was added in 1869, the geological survey in 1879, a reclamation bureau in 1902, a bureau of mines in 1910. At various dates, the department has been given supervision of the governments of Alaska, Hawaii, and the Virgin Islands, adminis-

title of the act of 1849 used the term Home Department, but the body of the measure substituted Department of the Interior, and the latter name is always used, both officially and popularly. On the origins of the department, see H. B. Learned, *The President's Cabinet*, Chap. x, and L. M. Short, *Development of National Administrative Organization in the United States*, Chap. ix.

<sup>1</sup> Short, *op. cit.*, Chap. xvii.

tration of the national parks and monuments, and control of certain hospitals. Some functions once belonging to it have been taken away: for example, the recording of copyrights<sup>1</sup> was given over to the librarian of Congress in 1870, after having been attended to in the Interior Department for eleven years; the census office, established as a permanent bureau in 1902, was transferred to the new Department of Commerce and Labor in the following year; the patent office and bureau of mines were removed to the Department of Commerce in 1925, and in 1930 the bureau of pensions—taking with it over seventy per cent of the Interior Department's annual appropriation—was placed in a new independent establishment known as the Veterans' Administration.<sup>2</sup> Several other transfers are proposed by the authors of reorganization plans. But the department is still one of exceptionally varied, as well as unusually interesting, activities. Some of its branches, *e. g.*, the general land office, have passed the peak of their administrative load under existing legislation, and one—the bureau of Indian affairs—has before it (in the words of Secretary Wilbur) the definite and unique goal of "working itself out of a job" by making the Indians a self-supporting part of our population. But other branches, *e. g.*, the reclamation service and the bureau of education, have before them the prospect of long and increasing labors—unless, in the latter instance, the work should be transferred to the oft-proposed separate department.

If one were to attempt to single out the most important object toward which the department's energies are directed, it would undoubtedly be found to be the exploration, measurement, development, allocation, and conservation of the country's natural resources. Not all of the agencies employed for this purpose are located in the Interior Department.<sup>3</sup> Nevertheless, here one finds the general land office, the bureau of reclamation, and the geological survey, not to mention the national park service and the Alaska Railroad (formerly the Alaska engineering commission). The administration of public lands has always been one of the government's largest tasks. Most of the territory of the United States, outside of the thirteen original states and the insular possessions, has been, at one time or another, public land (a total of 2,925,000 square miles); and the amount remaining unreserved and un-

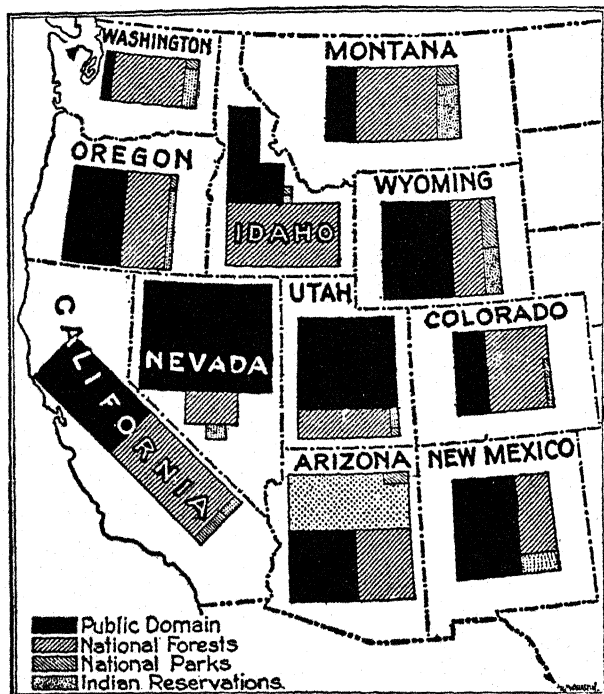
Public land  
adminis-  
tration

<sup>1</sup> See p. 613 below.

<sup>2</sup> G. A. Weber, "The Bureau of Pensions," *Service Monographs*, No. 24 (Baltimore, 1923).

<sup>3</sup> For example, the forestry bureau is in the Department of Agriculture.

appropriated in 1930 was upwards of five hundred million acres, an area almost equal to that of the five largest states of the Union taken together.<sup>1</sup> Vast quantities were in earlier times granted to states in aid of education and internal improvements, and to trans-continental railroads; much was allotted to soldiers and sailors; a



From the New York Times

#### GOVERNMENT HOLDINGS IN PUBLIC LAND STATES

More than half the land in these eleven states is held by the federal government. The 42,000,000 acres of government mineral lands (containing coal, oil, potash, and minerals) are not included in the map, as they are not confined to the eleven public land states.

great deal has been sold, either to corporations and individual speculators, or to settlers under the easy terms of a homestead act of 1862. Prodigality prevailed in earlier days, and many species of fraud were practiced. Of late, however, this steadily diminishing resource has been better husbanded. On the basis of careful surveys,

<sup>1</sup> In the United States proper, about 180,000,000 acres, and the remainder in Alaska. There are public lands in Porto Rico, Hawaii, and the Philippines, but these are administered by the territorial governments.

the land is now classified as mineral, timber, grazing, or agricultural; legislation fully regulates the acquisition of mineral land and land affording water-power sites; and every effort is made to favor the bona fide home-seeker as against the mere speculator. Under the direction of the general land office at Washington, some thirty local land offices, each in charge of a register and a receiver, are prepared to consider claims, issue land patents, and transact other public-land business. Entries of all kinds proceed at the rather rapid rate of from three and one-half to five million acres a year.<sup>1</sup>

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The reclamation service, established in 1902, is charged with the construction and maintenance of irrigation works in arid and semi-arid regions, thus helping private and state enterprise to make available for farmers the hundreds of thousands of acres of dry lands in the western states. The reclaimed lands are sold to settlers on an instalment plan; and more than a million acres were put on the market up to 1918.<sup>2</sup> Greater difficulties than were originally anticipated have, however, been encountered—especially the heavier costs of irrigation projects and the longer time required to make reclaimed land reliably productive—and, beginning in 1924, committees of expert advisers have submitted extensive recommendations for legislation aimed at enabling the government's reclamation work to achieve in a more adequate manner the human and economic purposes for which it was begun. The geological survey—which affords a fine example of the place of science in governmental work—studies, reports, and publishes maps and charts on the topography, geology, and water and mineral resources of the country, and classifies the public lands.<sup>3</sup>

Other  
services  
having  
to do  
with  
resources

Finally, it may be noted, in a word, that the Indian office acts as the official guardian of some 350,000 Indians (all recently made citizens of the United States), living on two hundred reservations having an aggregate area as large as New England and New York combined. It promotes their health and physical welfare, directs

Miscel-  
laneous  
bureaus

<sup>1</sup> *Annual Report of the Secretary of the Interior* (1930), p. 16. For general discussions, see Anon., "The General Land Office," *Service Monographs*, No. 13 (Baltimore, 1923); S. V. Proudft, *The Public Land System of the United States* (Washington, 1924); H. S. Graves, "The Public Domain," *Nation*, CXXXI, 147-149 (Aug. 6, 1930).

<sup>2</sup> F. A. Ogg, *National Progress, 1907-1917*, pp. 107-112; Anon., "The U. S. Reclamation Service," *Service Monographs*, No. 2 (Baltimore, 1919); D. Lampen, *Economic and Social Aspects of Federal Reclamation* (Baltimore, 1930).

<sup>3</sup> Anon., "The U. S. Geological Survey," *Service Monographs*, No. 1 (New York, 1918).

their education, encourages their native arts and crafts, and supervises their lands and funds.<sup>1</sup> The office (formerly bureau) of education, which has lately undergone considerable reorganization, gathers statistics, makes surveys, prepares reports, issues digests of school laws, organizes conferences, and offers recommendations for the improvement of educational facilities and methods, but has no administrative duties except in connection with the education and medical relief of the natives of Alaska and the expenditure of federal funds appropriated for the maintenance of colleges of agriculture and the mechanic arts.<sup>2</sup>

Suggestions that the national government extend the sphere of its activities to include the encouragement of agriculture were heard as early as Washington's first administration, and various plans for agricultural boards and bureaus were before Congress intermittently from 1817 onwards. Somewhat curiously, the first definite action was taken amid the stress of civil war, when, in 1862, a bill was approved creating, not an agricultural bureau in the Interior Department, as some advocated, nor yet a coördinate executive department with a representative in the cabinet, as others urged, but a "department" in charge of a commissioner, with rank and salary distinctly below those of the heads of the existing departments.<sup>3</sup> Agricultural interests were naturally dissatisfied, and the rapid increase of activities of the so-called department in the next twenty-five years, accompanied by growing appropriations, enabled them finally to carry their point that agriculture ought to have a spokesman in the cabinet; and in 1889 President Cleveland signed a bill which raised the so-called department of agriculture to the grade of an executive department, in charge of a secretary of cabinet rank.<sup>4</sup>

Already, in 1889, the work of the department was of a widely

<sup>1</sup> L. F. Schmeckebier, "The Office of Indian Affairs," *Service Monographs*, No. 48 (Baltimore, 1927). A persistent impression that the Indian service had not kept pace with progress in other fields led to the appointment of an investigating commission in 1926. The commission's findings are presented in L. Meriam and Associates, *The Problem of Indian Administration* (Baltimore, 1928). Cf. W. A. Du Puy, "The New Policy of Aiding the American Indians," *Curr. Hist.*, XXXII, 1138-1143 (Sept., 1930).

<sup>2</sup> D. H. Smith, "The Bureau of Education," *Service Monographs*, No. 14 (Baltimore, 1923); H. B. Learned, "The Educational Function of the National Government," *Amer. Polit. Sci. Rev.*, XV, 335-349 (Aug., 1921).

<sup>3</sup> This measure was accompanied by the Morrill Act granting tracts of land for the establishment of agricultural colleges in the states, and also by an important homestead act.

<sup>4</sup> H. B. Learned, *The President's Cabinet*, Chap. xi.

varied and undoubtedly useful character. But during the three and a half decades since that date new functions have been added and tasks assumed, until nowadays the department forms by all odds the greatest governmental establishment of its kind in the world, whether in scope of activities or in number of officials and employees. Moreover, in comparison with the other departments, it presents two or three rather unique features. In the first place, it has practically no functions that are not clearly germane to the principal object of its existence. It has grown almost entirely from within, developing its plans and needs, and subsequently securing from Congress the appropriations necessary to their fulfillment; Congress has not thrust miscellaneous and alien bureaus and activities upon it, as in the case of several other departments. In the second place, the head of the department has more complete control, and the organization is more compact, than in most of the older departments. Finally, because of the scientific and technical nature of much of the work, the merit system finds wider application than elsewhere and the handicaps of political appointments are less in evidence. So true is this that persons who have the best interests of the agricultural bureaus at heart always oppose the transfer of any such bureau or service, *e.g.*, the bureau of public roads, to the Interior or any other department.

CHAP.  
XVIIISpecial  
character-  
istics

Even the briefest description of the work of the department would demand more space than is available here; there are no fewer than fourteen main bureaus or services, each with a large field of activity and a staff suited thereto. And it may be added that the importance of the department's activities has been greatly increased by the agricultural depression of recent years, and by growing recognition of the fact that agriculture as an industry is going to be increasingly under the necessity of readjusting itself to more or less permanent changes in the general basis of our national economic life. The original, and still most important, function of the department is scientific research and dissemination of the information gained thereby, and under the general supervision of a director of scientific work are gathered six bureaus—animal industry,<sup>1</sup> dairy industry, plant industry, biological survey,<sup>2</sup> chemistry and soils,<sup>3</sup>

Divisions  
and activ-  
ities

<sup>1</sup> F. W. Powell, "The Bureau of Animal Industry," *Service Monographs*, No. 41 (Baltimore, 1927).

<sup>2</sup> C. Jenks, "The Bureau of Biological Survey," *ibid.*, No. 54 (Baltimore, 1929).

<sup>3</sup> G. A. Weber, "The Bureau of Chemistry and Soils," *ibid.*, No. 52 (Baltimore, 1928).

and entomology—which are given over entirely to investigation, experiment, and study, with a view to improvements in the growing of crops, the breeding of live stock, and related industries. A director of extension service has supervision of the dissemination of research results and other useful information, largely through extension agents in coöperation with agricultural colleges. And a director of regulatory work has charge of the administration of numerous laws falling within the department's field of responsibility.<sup>1</sup>

Several bureaus, however, remain outside this threefold classification. One is the bureau of home economics, originating in a reorganization carried out in 1923, and in charge of a scientifically trained and experienced woman. Another is the bureau of public roads,<sup>2</sup> which investigates road materials, road construction, and road maintenance, and also irrigation and drainage questions. A third is the forest service, which takes care of the hundred and fifty-six national forests (in thirty-three states and territories), investigates forestry problems, and shares responsibility with the land office and the reclamation service in the Department of the Interior for carrying out and extending the conservation program gradually developed since 1900. A fourth is the well-known weather bureau, which, with the aid of its numerous stations throughout the country, conducts meteorological inquiries and forecasts weather conditions for the benefit alike of agriculture, commerce, and navigation—a bureau, it may be added, the usefulness of which has been vastly increased by the growth of communication by radio.<sup>3</sup> A fifth is the bureau of agricultural economics, created in 1922, in which are merged several agencies, once separate, having to do with the study of economic questions involved in production, marketing, and distribution of farm products. The most notable development of the department's work in recent years has been, indeed, in the promotion of agriculture on its economic, as distinguished from its scientific, side. On June 30, 1930, the department had 25,736 full-time employees, of whom practically four-fifths were engaged in work outside of Washington.<sup>4</sup>

<sup>1</sup> For example, the Packers and Stockyards Act, the Grain Futures Act, and the Insecticide and Fungicide Act.

<sup>2</sup> W. S. Holt, "The Bureau of Public Roads," *Service Monographs*, No. 26 (Baltimore, 1923). On the connection between federal and state highway administration, see pp. 626-627 below.

<sup>3</sup> G. A. Weber, "The Weather Bureau," *ibid.*, No. 9 (New York, 1922).

<sup>4</sup> L. M. Short, *Development of National Administrative Organization in the United States*, Chap. xvii. The actual work of the department is described con-

As was to be expected, the movement for a department of agriculture prompted agitation on similar lines by commercial interests and organized labor. A purely statistical bureau of labor, organized in the Interior Department in 1884, became, four years afterwards, a so-called department of labor. But only in 1903 was a full-fledged department set up, with a representative in the cabinet, and then only in conjunction with commerce. The main interest was, indeed, in a department of commerce, which President Roosevelt urged upon Congress as a national necessity in view of the difficult problems arising from the growth of big business in the opening years of the century. The bill creating a department of commerce and labor was opposed by labor organizations, which demanded a separate and coördinate labor department. It, however, became law (1903);<sup>1</sup> and only in 1913, in the closing days of the Taft administration, was the separation which labor desired finally brought about. Since the last-mentioned date, there have been distinct commerce and labor departments.<sup>2</sup>

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Demand  
for com-  
merce and  
labor de-  
partments

The combined department, as organized in 1903, represented, in the main, a consolidation of offices and services transferred from the State, Treasury, and Interior departments, together with the hitherto independent "department" of labor; only two new bureaus appeared, *i.e.*, manufactures and corporations, and both of these have now dropped out.<sup>3</sup> As at present constituted, the Department of Commerce contains twelve bureaus and services, presided over by chiefs or directors, under the general supervision of the secretary, an assistant secretary, and an assistant secretary for aeronautics. The bureau of foreign and domestic commerce collects and publishes commercial statistics, investigates and reports on trade openings, and coöperates generally with American manufacturers, exporters, financiers, and domestic merchants. It is organized in upwards of thirty divisions, some in charge of development in definite parts of the world (Latin America, Far East,

9. Depart-  
ment of  
Commerce

Bureau of  
foreign and  
domestic  
commerce

cretely in the *Report of the Secretary of Agriculture* for successive years. These reports commonly go into much detail on the agricultural situation of the country.

<sup>1</sup> H. B. Learned, *The President's Cabinet*, Chap. XII; F. Emory, "The New Department of Commerce and Labor," *World's Work*, V, 3334-3337 (Apr., 1903).

<sup>2</sup> The history of these departments is related in L. M. Short, *Development of National Administrative Organization in the United States*, Chap. XIX.

<sup>3</sup> The first was merged with the bureau of statistics to form the bureau of foreign and domestic commerce in 1912; the second was abolished in 1915 as a result of the establishment of the Federal Trade Commission (see p. 604 below).



etc.), and some having to do with encouragement of traffic in particular commodities (textiles, paper, foodstuffs, agricultural implements, etc.), besides technical divisions of foreign tariffs, statistics, research, etc., and administrative divisions of editorial work, correspondence, and similar activities. The director reported in 1927 that the bureau's work had increased nearly twenty-three per cent over that of the previous year, and that in a single twelve-month it had responded, in almost two and one-half million cases, to "the expressed desire of American business men for pertinent information or direct assistance in the acquiring of new business or the furthering of already established trade."<sup>1</sup> This bureau is a great and growing factor in our national economic life. As has been pointed out, it may eventually absorb all of the trade-promotion functions hitherto devolving upon our consuls.<sup>2</sup>

There are at least five other bureaus whose work relates mainly or wholly to commerce—not, it is true, to trade itself, but to the physical facilities with which it is carried on. The bureau of navigation has to do with the inspection of naval architecture, admeasurement and numbering of vessels, administration of tonnage taxes, and enforcement of navigation laws.<sup>3</sup> The steamboat inspection service inspects certain classes of domestic merchant steam vessels, motor vessels, sailing vessels, and barges of the United States, and foreign steam vessels carrying passengers from ports of the United States, except those of countries having reciprocal inspection with the United States.<sup>4</sup> The lighthouse service has charge of the construction and maintenance of lighthouses and other aids to navigation along the coasts, the Great Lakes, and the principal rivers of the country. The coast and geodetic survey assists mariners by charting the coastlines of the United States and its dependencies, as well as lake and river beds and ocean currents.<sup>5</sup> And an aeronautics branch, presided over by an assistant secretary for aeronautics, coördinates varied and expanding activities of the department having to do with executing an air commerce act of 1926, relating especially to such matters as the provision of civil

<sup>1</sup> *Fifteenth Annual Report of the Secretary of Commerce* (1927), 70.

<sup>2</sup> See p. 339 above. L. F. Schmeckebier and G. A. Weber, "The Bureau of Foreign and Domestic Commerce," *Service Monographs*, No. 29 (Baltimore, 1924).

<sup>3</sup> L. M. Short, "The Bureau of Navigation," *ibid.*, No. 15 (Baltimore, 1923).

<sup>4</sup> L. M. Short, "The Steamboat Inspection Service," *ibid.*, No. 8 (Baltimore, 1922).

<sup>5</sup> G. A. Weber, "The Coast and Geodetic Survey," *ibid.*, No. 16 (Baltimore, 1923).

airways and air ports, the inspection and licensing of aircraft, the investigation of accidents, and the enforcement of air-traffic rules.<sup>1</sup>

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There are, in addition, certain bureaus whose connection with commerce is more incidental. A fisheries bureau promotes commercial fisheries and fishery industries, aids in the propagation and conservation of fishery resources, and supervises the Alaska fur-seal industry. A bureau of standards carries on research in fields in which precise measurements are required, and compares and tests standards of measurement employed in scientific investigation, commerce, and educational institutions with the standards adopted or recognized by the government.<sup>2</sup> A bureau of mines (transferred from the Department of the Interior in 1925) investigates methods of mining, mine accidents and the means of preventing them, and the treatment and utilization of ores, and seeks to bring about both safer and more healthful conditions among workers in the mineral industries and increased efficiency in the use of the country's mineral resources. A radio division, set up in pursuance of a radio act of 1927, prescribes operators' qualifications, issues operators' licenses, inspects transmitting apparatus, and reports to the Federal Radio Commission applications for radio station licenses, and also violations of the national radio laws. A division of public construction, created in 1930, has thus far devoted its efforts to coördinating the attempts of national, state, and local governments to expedite public works construction projects as a means of increasing employment during a period of depression.

Miscellaneous  
bureaus

Finally, there are the patent office and the bureau of the census. Authorized by the constitution to make laws "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,"<sup>3</sup> Congress passed the first patent act in 1790. Machinery for administering the law was gradually built up in the State Department, but was transferred in 1849 to the Department of the Interior, and again, in 1925, to the Department of Commerce. Patents are issued upon application of inventors if, after careful scrutiny, the device or process is judged by

Patent  
office

<sup>1</sup> L. F. Schmeckebier, "The Aeronautics Branch, Department of Commerce," *Service Monographs*, No. 61 (Baltimore, 1930).

<sup>2</sup> G. A. Weber, "The Bureau of Standards," *ibid.*, No. 35 (Baltimore, 1925).

<sup>3</sup> Art. I, § 8, cl. 8.

expert examiners to be novel and useful; and the right to exclude others from manufacturing, using, or controlling the device or process runs for seventeen years. Upwards of half of all patents issued in the civilized world have been granted in the patent office of the United States; the millionth was issued in 1911, and the one and one-half millionth on July 1, 1924. Each applicant pays a fee of forty dollars, and the patent office has become one of the relatively few government establishments that not only pay their way, but yield a surplus. It is hardly necessary to add that records and models at Washington afford an unsurpassed panorama of the progress of the industrial and scientific arts in the past hundred years.<sup>1</sup>

The  
census  
bureau

The bureau of the census—"the greatest fact-finding and figure-counting agency in the world"—is charged with taking the decennial census required by the constitution, and also the various supplementary enumerations provided for by statute. Until two decades ago, decennial censuses were taken by a staff specially organized on each occasion for the purpose, and when the work was completed the machinery was dismantled, to be set up entirely anew at the next census period. A permanent census office, under a director, was, however, established in 1902,<sup>2</sup> partly with a view to developing an experienced staff, but mainly in order to enable the work to be done more deliberately by being carried on, in one phase or another, practically all of the time. The range of census inquiries has increased greatly, and the published reports have grown proportionately voluminous. Whether consulted in their fuller form or in the form of the convenient *Abstract* published decennially, these reports give a comprehensive and illuminating view of the population, occupations, wealth, and activities of the country.<sup>3</sup> Since 1921, the census of manufactures has been bien-

<sup>1</sup> On the legislative and judicial aspects of copyrights and patents, see pp. 613-616 below. Trade-marks and labels are also registered in the patent office, at a present rate of some seventeen thousand a year. Registration entitles the owner to exclusive use of the trade-mark or label for a period of twenty years, and at the end of that time is renewable for a like period. *U. S. Compiled Statutes* (1918), pp. 1532-1537; *ibid.* (1923), pp. 628-630; G. A. Weber, "The Patent Office," *Service Monographs*, No. 31 (Baltimore, 1924).

<sup>2</sup> In the Interior Department, but transferred to the Department of Commerce and Labor in 1903, and retained in the Department of Commerce since 1913.

<sup>3</sup> W. S. Holt, "The Bureau of the Census," *Service Monographs*, No. 53 (Baltimore, 1929); W. R. Merriam, "The Evolution of American Census-taking," *Century Mag.*, LXV, 831-842 (Apr., 1903); J. Cummings, "The Permanent Census Bureau; a Decade of Work," *Amer. Statist. Assoc. Pub.*, XIII, 606-638 (Dec., 1913); W. F. Willeox, "Development of the American

nial, and, in fact, in certain industries, annual; by law of 1919, the census of agriculture is quinquennial. For a brief period, while the decennial census is being taken, one person out of every thousand in the country is engaged in one form or another of census work.

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As defined by the organic act of 1913, the purpose of the Department of Labor is "to foster, promote, and develop the welfare of the wage-earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment." The different branches of the department, therefore, have to do in an exceptionally direct way with matters affecting the everyday well-being of men, women, and children. At the outset, there were only four of these branches, *i. e.*, the bureaus of labor statistics, immigration, and naturalization, and the children's bureau. But as a result of successive reorganizations, and of functional expansion, there have come to be double that number (although not of coördinate rank), under the general supervision of a secretary and two assistant secretaries. Historically, the department's primary function is the gathering and publishing of labor statistics; and the bureau devoted to this work (really dating from 1885) has amassed great quantities of useful information pertaining to the labor supply, labor productivity, hours, wages, prices and cost of living, strikes and lockouts, labor laws and court decisions, women in industry, industrial accidents, workmen's compensation, and other labor interests, both in this country and abroad. The results of the investigations are made available promptly through a monthly publication, the *Labor Review*, supplemented by numerous monographs or "bulletins." With a view to promoting industrial peace, a division of conciliation was organized in the department in 1913. When trade disputes arise, commissioners of conciliation representing the department offer their services as mediators; in the single year ending June 30, 1929, commissioners were assigned in 522 instances of strikes, threatened strikes, and lockouts, involving many hundred thousand workers, and in 385 of the cases the efforts at pacification were

10. Depart-  
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Labor

Labor  
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proper

Census Office since 1890," *Polit. Sci. Quar.*, XXIX, 438-450 (Sept., 1914); O. McKee, "Counting Heads in the Nation," *No. Amer. Rev.*, CCXXIX, 483-489 (Apr., 1930); L. F. Schmeckebier, *The Statistical Work of the National Government* (Baltimore, 1925). On the taking of the fifteenth decennial census in 1930, see *Eighteenth Annual Report of the Secretary of Commerce* (1930), 68-92; also *U. S. Daily*, Apr. 8, 1929, pp. 299 ff., and Apr. 25, p. 452.

successful.<sup>1</sup> Still another branch of the department is the United States employment service, organized on its present basis in 1918, and representing one of the very few Labor Department "war services" that now survive. In coöperation with the public employment services of various states and municipalities, the national service placed in employment nearly a million and a half men and women during the fiscal year 1928. Naturally, the number of persons aided in securing positions in any given period varies with the general condition of the labor market.<sup>2</sup>

Two important bureaus of somewhat different nature are those dealing specially with the interests of children and women. The children's bureau, created in 1912 to investigate and report upon "all matters pertaining to the welfare of children and child life among all classes of our people," has thus far given attention mainly to problems of child hygiene, child dependency, child employment in industry, and juvenile delinquency. The women's bureau, dating from 1920, is required to "formulate standards and policies which shall promote the welfare of wage-earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment." In pursuance of these objects, it investigates conditions of women in industry, confers and coöperates with state departments of labor, holds public conferences, and engages in research on a wide variety of topics connected with the well-being of the eight and one-half million women employed in gainful occupations.<sup>3</sup> Every year the bureau is obliged to refuse more requests than it can grant for help in investigations and for consultation on local problems asked for by employers and employees, public and private organizations, and other persons and agencies interested in women's employment.<sup>4</sup>

Finally, there are the two somewhat older bureaus of immigration and naturalization. The work of both of these agencies is touched upon elsewhere;<sup>5</sup> hence little need be said about them here. Under the national quota system adopted in 1924, the number of aliens entering the country is decidedly smaller than in earlier years. The task of administering the laws on the subject is, how-

<sup>1</sup> J. Bernhardt, "The Division of Conciliation," *Service Monographs*, No. 20 (Baltimore, 1923).

<sup>2</sup> D. H. Smith, "The United States Employment Service," *ibid.*, No. 28 (Baltimore, 1923).

<sup>3</sup> This is the 1920 figure. Unfortunately, there is none later.

<sup>4</sup> G. A. Weber, "The Women's Bureau," *Service Monographs*, No. 22 (Baltimore, 1923).

<sup>5</sup> See pp. 591-594 below.

ever, far from proportionately lessened.<sup>1</sup> The fact that aliens are naturalized in the courts, and not by a field force of the Labor Department, means that the bureau of naturalization is small numerically. Agents of the bureau are, however, being employed increasingly in gathering information concerning applicants; and much additional work is found in seeing that the naturalization laws are not evaded and in encouraging assimilation and citizen training.<sup>2</sup>

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There is a story of a victim of amnesia who, on being picked up on a street in Washington and questioned, could not so much as tell to what federal commission he belonged! The tale originated as a jibe at the penchant of President Hoover for appointing investigating commissions such as those on law observance and enforcement, unemployment, and social trends.<sup>3</sup> But it will serve to preface the observation that, vast as is the departmental mechanism described above, alongside that impressive and ever-expanding structure has been built up a remarkable group of agencies which, for want of a better term, are commonly known as the "independent establishments." Most of this development has taken place within the last two decades. Out of a score of major detached boards and commissions which are something more than temporary fact-finding bodies, only two—the Civil Service Commission (1883) and the Interstate Commerce Commission (1887)—antedate the present century; six were created between 1913 and 1916 inclusive, two during our participation in the World War, and the remainder since 1920 (chiefly in the early post-war years 1920-21). The full number, of all types, is between fifty and sixty. Some are temporary, and some permanent. Some have only members serving *ex-officio*; others have only members specially appointed. Some have to do with commerce and business, some with finance, some with natural resources, some with civil service, some with education. Some have only fact-finding powers; others are mainly advisory; still others are administrative, or have legislative authority, or are arbitral or judicial; and some combine most or all of these many different functions.<sup>4</sup>

Independent  
establish-  
ments

Number and  
variety

<sup>1</sup> D. H. Smith and H. G. Herring, "The Bureau of Immigration," *Service Monographs*, No. 30 (Baltimore, 1924).

<sup>2</sup> D. H. Smith, "The Bureau of Naturalization," *ibid.*, No. 46 (Baltimore, 1926).

<sup>3</sup> See pp. 309-311 above.

<sup>4</sup> Omitting boards and commissions that are only temporary fact-finding

The reasons for the growth of the independent establishments are many and varied. If one is inquiring simply why the activities of such agencies as the Federal Trade Commission or the Federal Reserve Board have been entrusted to authorities placed outside rather than inside one or another of the ten departments, the answer will be found partly in the reluctance of Congress to impose any more heterogeneous duties upon the departments than most of them already have, but more largely in the belief that the tasks to be provided for would be performed more safely and satisfactorily by officials appointed directly by the president and Senate than by subordinates in a department, and by a board bringing several minds to bear on the problems involved than by officials acting singly. If, however, one is looking, more deeply, into the reasons why the activities assigned to these establishments have been undertaken at all, he will find—taking the more important boards and commissions as a group—that they have been rendered necessary (1) by the overflowing of state boundaries by trade and business, requiring that state regulation be supplemented with national control; (2) by the inability of Congress—on account of the complexity, technicality, constant fluctuations, and expanding scope of the problems involved—to provide such control on other than very

agencies, the principal independent establishments (with date of creation) are as follows:

*Commerce, Business, and Agriculture*  
Interstate Commerce Commission  
(1887)

Federal Trade Commission (1914)  
Tariff Commission (1916)  
U. S. Shipping Board (1916)  
Inland Waterways Corporation (1920)  
Board of Mediation (1926)  
Federal Radio Commission (1927)  
Federal Farm Board (1929)

*Public Finance*  
Federal Reserve Board (1914)  
War Finance Corporation (1918)  
Bureau of the Budget (1921)  
General Accounting Office (1921)  
Board of Tax Appeals (1924)

*Natural Resources*  
Federal Power Commission (1920)  
Federal Oil Conservation Board  
(1924)

Commission on Conservation and Management of the Public Domain  
(1929)

*Civil Service*  
Civil Service Commission (1883)  
Bureau of Efficiency (1916)  
Employees' Compensation Commission  
(1916)  
Personnel Classification Board (1923)

*Miscellaneous*  
Board of Road Commissioners for Alaska (1905)  
Aeronautical Board (1916)  
Federal Board for Vocational Education (1917)  
National Capital Park and Planning Commission (1925)  
Federal Narcotics Control Board (1922)  
Interoceanic Canal Board (1929)  
Veterans' Administration (1930)

*Cf. List of Federal Commissions, Committees, Boards, and Similar Bodies Created During the Period Sept. 14, 1901, to Mar. 4, 1929 (71st Cong., 2nd Sess., Sen. Doc. No. 174).*

broad and general lines; (3) by the resulting need of setting up special regulating authorities, endowed with technical knowledge and able to work consistently and continuously on the basis of patiently acquired experience;<sup>1</sup> and (4) by the world-wide tendency to bring more and more matters within the range or scope of public control, and to centralize such control in the larger, and even the largest, units of government. In the domain of commerce, for example, the states struggled for half a century with problems of regulation, only to bring into being two score distinct and incompatible sets of rules and machinery for the control of a mass of business operations patently requiring regulation in the public interest, yet by their very nature knowing no state frontiers. The upshot was federal regulation, supplied in its larger outlines by act of Congress, but obviously requiring application and administration by some more specialized authority—such an authority, in short, as Congress promptly brought into existence for the purpose in the form of the Interstate Commerce Commission.

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It is not practicable to enter here upon a history and description of even the most important of the long list of independent establishments. The work of a number of them will be touched upon at appropriate points in later chapters.<sup>2</sup> A few words may, however, be ventured about the fundamental types of activity in which most of them are engaged. As has been stated, some are purely investigative, with no powers to make rules, decide disputes, or perform administrative acts. Of such nature is the Tariff Commission, charged only with studying the administration, operation, and effects of the tariff laws and also the tariff relations of the United States with other countries, and with reporting findings to the president and Congress. Other establishments are investigative, but with added authority to use their influence, in more or less direct ways, to promote stipulated ends, conditions, or interests. Such, for example, are the Aëronautical Board, charged with coördinating the army and navy air services, and the Federal Oil Conservation Board, created to inquire into and conserve our natural petroleum resources. A few are essentially managerial, like the Arlington Memorial Bridge Commission. But many are charged with large administrative, legislative, or judicial authority, or even with all three simultaneously. Thus the Federal Power Commission administers "all water power sites and kindred establishments

Types of  
activity

<sup>1</sup> C. A. Beard, "Government by Technologists," *New Republic*, LXIII, 115-120 (June 18, 1930).

<sup>2</sup> See pp. 556, 565-569, 599-611 below.



located on the navigable waters, the public lands, and the reservations of the United States;"<sup>1</sup> while the Board of Tax Appeals and the Board of Mediation sit as courts, hear cases, and render decisions—on strictly arbitral and judicial lines—on appeals brought by tax-payers and on disputes between common carriers and their employees, respectively. The greatest of all the commissions are, however, at one and the same time administrative, legislative, and judicial, and of course also investigative and advisory. Such are the Interstate Commerce Commission, the Federal Trade Commission, the Federal Radio Commission, and a number of others. The Interstate Commerce Commission, for example, is almost a government in and of itself, with the Interstate Commerce Act of 1887 and later transportation acts of Congress as a sort of constitution; with sweeping administrative, legislative, and judicial powers (including the power to fix rates); with a body of eleven well-paid commissioners in charge; with a full dozen branches or bureaus; with more than two thousand employees; with an annual appropriation of over seven and one-half million dollars—and, despite all, the most overworked institution, it has been said, in our entire federal establishment.

Criticisms  
and justifi-  
cations

Much has been heard of late about the insidious growth and direful possibilities of "government by commission," in the national sphere as well as in the states. We read of Washington as being "a nest of commissions which is now the seat of a triumphant bureaucracy."<sup>2</sup> We are warned that the basic principle of our governmental system is being violated and gradually broken down by the devolution of legislative and judicial powers—thinly disguised under the terms *quasi-legislative* and *quasi-judicial*—upon bodies which are neither legislatures nor courts, and are told that if present tendencies continue, the commissions will grow so powerful and so strongly entrenched that the legislative branch with which the fathers endowed us will begin to atrophy, after the manner of the Roman Senate. Such criticisms are largely beside the mark. In the first place, the independent establishments against which they are directed are created only by act of Congress, and are given only such powers and liberties as Congress believes to be consistent with the public well-being. In the second place, the powers and functions bestowed are, in nearly all cases, of such

<sup>1</sup> For a recent notable controversy involving the personnel of this body, see p. 278, n. 1, above.

<sup>2</sup> S. Bent, "Bureaucracy Triumphant," *Century Mag.*, CVII, 180-189 (June, 1926).

nature that provision must be made for them in some manner; and since Congress has neither the time nor the skill to carry the burden, there is no alternative to setting up other agencies to do it.

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Finally, the detached board or commission seems, on the whole, the best type of agency for the purpose. For the kinds of work usually involved, it has, or should have, peculiar qualifications. Its members are presumably selected with a view to the nature of the work to be performed. They enjoy relatively long terms, and commonly acquire a high degree of expertness. The commission has time and facilities for investigation and deliberation, as well as for decision and action. In making rules and deciding appeals, it has the advantage of sufficient numbers to yield a balanced judgment, yet not sufficient to cause delay and inaction. Its procedure, compared with that of legislatures and courts, is flexible and informal. It can, and often does, maintain helpful and significant relations with corresponding agencies in the states. Lastly, it is not an "independent" establishment in any ultimate and literal sense of the term, any more than is an executive department. Its members are not only appointed by the president and Senate, but subject to removal by the president without restriction. It reports to the president or to Congress; it can be investigated and held to account; the rules that it makes can be set aside by statute (even if they rarely are so), and its judicial acts can almost invariably be reviewed, on appeal, by an appropriate court. This is not tantamount to saying that the commission system is altogether free from shortcomings, abuses, and even dangers. Certainly it has turned the workings of our government into new and unexpected channels. After all, the revolutionary thing that has happened, however, is the decision to impose upon the government the multi-fold newer tasks which the commissions are nowadays found performing; the style of machinery employed to take care of this work is, relatively, a matter of detail.<sup>1</sup>

<sup>1</sup> Nearly all of the more important independent establishments are treated in volumes in the *Service Monographs* series, cited at appropriate points below. A full list, with conveniently arranged data, will be found in *Departments and Establishments of the United States Government*, Leaflets XI-XIV (National League of Women Voters, Washington, 1930). Lists and current information appear in successive volumes of the *American Year Book*. The subject is treated historically in L. M. Short, *Development of National Administrative Organization in the United States*, Chap. xx. A significant article is J. Hart, "The Bearing of *Myers v. United States* upon the Independence of Federal Administrative Tribunals," *Amer. Polit. Sci. Rev.*, XXIII, 657-673 (Aug., 1929); and rule-making powers are dealt with at length in J. P. Comer,

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XVIIINeed of administrative  
reorganization

One need not be surprised to be told that in the wide-spreading mechanism of executive and administrative agencies outlined in this chapter and the preceding one there is a good deal of illogical grouping, duplication, and confusion, with resulting waste of effort and money. Many offices and bureaus, it is true, upon being created to meet some definite administrative need, have been fitted into the system in a manner entirely appropriate. But in perhaps equally numerous instances a new unit or service has been simply tacked on at any point that at the moment seemed convenient, or that political or other extraneous considerations dictated. In many cases, no new unit or service ought to have been created at all; an existing one ought merely to have been enlarged or otherwise reconstructed. The upshot is that we to-day find ourselves confronted with some very large and difficult questions of administrative reorganization. Some of the executive departments (notably the Treasury), instead of being integrated establishments with homogeneous, or at all events related, functions, are veritable labyrinths of unrelated units and services. Certain large administrative jobs, such as the promotion of public health and the conservation of natural resources, are parcelled out among half a dozen different agencies, scattered through three or four departments.<sup>1</sup> Several of the independent establishments ought to be in one of the departments, or at any rate to be more closely tied in with some coördinating agency or influence. The administrative services of the government, taken as a whole, lack unified supervision.

President  
Taft's commission on  
economy  
and  
efficiency  
(1910)

Until twenty years ago, such inquiries into the situation as were made had to do with the mere improvement of business methods, as, for example, in the matter of purchasing supplies.<sup>2</sup> But at length, interest turned also to the problem of administrative reorganization. President Taft was strongly of the opinion that improvements could be made, and accordingly he secured from Congress in 1910 an appropriation for an investigation. An able commission on economy and efficiency was created, and by far the most comprehensive and systematic study of the executive and administrative parts of the government ever undertaken was carried out, under five main heads: problems of a national budget,

*Legislative Functions of National Administrative Authorities* (New York, 1927), Chaps. II, IV-VIII.

<sup>1</sup> The situation is even worse in some instances. No fewer than fourteen separate bureaus or other agencies, distributed among six departments, have to do with the interests of the merchant marine. Fourteen bureaus, in nine different departments, are concerned with the construction of public works.

<sup>2</sup> The Keap Committee of 1905-09 did good work in this limited field.

problems of organization, problems of personnel, problems of financial procedure, and problems of business practice and procedure. A report fully describing the existing organization of the executive branch was published in 1911,<sup>1</sup> and many concrete recommendations for the abolition of certain services and the consolidation of others were offered. Unfortunately, no remedial action was taken.<sup>2</sup> The commission went out of existence in 1913 because of the failure of Congress to make provision for its support; a change of the party in power turned government activities into different channels; and the entrance of the country, a little later, into the World War thrust the matter completely into the background.<sup>3</sup>

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After peace was restored, however, the project was revived. The enormous multiplication of governmental agencies in the war period compelled considerable readjustments and retrenchments, and gave fresh emphasis to the need of a general reorganization. Certain of the states, notably Illinois, were actively carrying out highly advantageous administrative reforms.<sup>4</sup> And bills began to appear in Congress providing for the conversion of the Department of the Interior into a department of public works, and for the creation of departments of education, public welfare, conservation, public health, and even highways, aeronautics, and fine arts. Near the close of President Wilson's second administration, an act was approved (December 29, 1920) creating a congressional joint committee (of six members) on the reorganization of government departments;<sup>5</sup> and in the following spring, President Harding was authorized to appoint a seventh member representing the executive.<sup>6</sup> Mr. Walter F. Brown, of Toledo, the president's appointee and a later postmaster-general, became, indeed, chairman of the committee.

Congressional  
joint committee on  
reorganization  
(1920)

Since 1921, consideration of the subject has gone forward intermittently, under handicaps imposed not only by the bewilderingly complicated nature of the problem, but by partisan and

Developments  
since 1921

<sup>1</sup> "Outline of Organization of the United States Government, July 1, 1911," transmitted to Congress by the president, January 17, 1912 (62nd Cong., 2nd Sess., House Doc. No. 458).

<sup>2</sup> Unless the establishment of a national budget system in 1921, on lines recommended by the commission, be considered a belated result.

<sup>3</sup> G. A. Weber, *Organized Efforts for the Improvement of Methods of Administration in the United States* (New York, 1919), 84-94.

<sup>4</sup> See Chaps. xxxiv-xxxv below; W. F. Dodd, "State Reorganization and the Federal Problem," *Acad. Polit. Sci. Proceedings*, IX, 142-151 (1921).

<sup>5</sup> 41 *U. S. Stat. at Large*, 1083.

<sup>6</sup> 42 *U. S. Stat. at Large*, 3.

personal influences, including the opposition of various bureau chiefs and other officers who would be affected personally, or whose branches of the service would be affected, by the proposed changes. Various plans of reorganization were prepared for the joint committee's consideration, notably one emanating from the Institute for Government Research at Washington (a private research establishment),<sup>1</sup> and another, on less ambitious lines, from the National Budget Committee, of New York City.<sup>2</sup> The joint committee presented a preliminary report to the president in January, 1922, recommending, among other things, the establishment of a department of public welfare. Discussion of the suggestions went on in executive circles until February, 1923, when the committee presented a prospectus of its plans in the form of a letter from President Harding to Chairman Brown, accompanied by a chart exhibiting in detail the existing organization, and showing in parallel columns the even more extensive changes which the president and his associates were prepared to endorse.<sup>3</sup> Conspicuous among these were: consolidation of the military and naval establishments in a single department of national defense; transfer of all non-military functions of the present War and Navy departments to civilian departments; withdrawal of all non-fiscal functions from the Treasury Department; attachment of many of the existing independent establishments to some one of the departments; and creation of two new departments, *i.e.*, (1) communications and (2) education and welfare.

Depart-  
mental  
Reorganiza-  
tion Bill,  
1924-25

Congress made provision for continuing the joint committee, but otherwise nothing further happened until June 3, 1924, when Senator Smoot, representing the committee, introduced a "departmental reorganization" bill based upon a final report filed on the previous day. By no means all of the proposals of president and committee appeared in this measure. For example, the union of the War and Navy departments, vigorously opposed by both departments, was dropped. But the bill undertook (1) to transfer the patent office and the bureau of mines to the Department of Commerce, (2) to move the bureau of public roads and the office of supervising architect to the Interior Department; (3) to release the

<sup>1</sup> Set forth in full in W. F. Willoughby, *Reorganization of the Administrative Branch of the National Government* (Baltimore, 1923). Dr. Willoughby was director of the Institute.

<sup>2</sup> Published by the committee under the title, *A Proposal for Government Reorganization* (2nd ed., New York, 1921).

<sup>3</sup> 67th Cong., 4th Session, Sen. Doc. No. 302.

bureau of the budget from its nominal connection with the Treasury Department; (4) to set up an independent bureau of purchase and supply; (5) to make fresh assignments in certain departments to the assistant secretaries; (6) to authorize cabinet officers to reorganize their departments, subject to the approval of the president; and, finally, (7) to create an eleventh department, to be known as the department of education and relief, presided over by a cabinet officer, and charged with three major activities—education, public health, and veteran relief—each under the immediate control of an assistant secretary. The new department was to absorb (among other things) the existing veterans' bureau, the public health service of the Treasury Department, and the bureaus of pensions and education, then in the Department of the Interior.

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Notwithstanding endorsement of the proposals (including the new departments) in the Republican platform of 1924, and the earnest support of the plan by President Coolidge, the bill did not even reach the floor for debate in either house before the Sixty-eighth Congress expired on March 4, 1925. At the next regular session, a measure was introduced which would have set up a new joint commission of five persons charged with "surveying the administrative branches of the government" and recommending to the president transfers of bureaus or other units from one department or independent establishment to another, and empowering the president to carry out such changes by executive order, though not to go so far as to abolish or create a department. Hearings were held on this bill; but again nothing happened. The truth was that, while almost everybody was prepared to render lip-service to the general principle of reorganization, whenever a concrete plan was presented sufficient elements were found in opposition to ensure its defeat. This opposition, it should be observed, was by no means entirely selfish or stupid. No plan was so good but that others could be brought forward that, from certain points of view, had at least equal claims. There was honest doubt whether certain of the suggested changes—especially the creation of new executive departments—would not lead to undesirable increases of national control at the expense of the states. There was fear, too, lest reorganization might be found to have had the effect of throwing certain services or agencies into politics.

Failure  
to adopt  
a plan

When Mr. Hoover came to the presidency, it was assumed that administrative reorganization would be one of his major interests. As secretary of commerce in the Harding and Coolidge adminis-

President  
Hoover and  
reorganiza-  
tion

trations, he had introduced important improvements in his own department, and he was known to be a stickler for business and administrative efficiency. Nor did he fail to meet expectations. In his first message to Congress, he referred to the investigations previously made, and declared reorganization "a necessity of sound administration, of economy, of more effective governmental policies, and of relief to the citizen from unnecessary harassment in his relations with a multitude of scattered governmental agencies." He appointed an administrative assistant to function in connection with the independent establishments for which the president has direct responsibility, and announced that an additional duty of this official would be "to coöperate with members of the cabinet in the study and development of a plan for the reorganization of the federal departments."<sup>1</sup> And as opportunity offered, he used such powers as Congress gave him to carry out certain definite changes, notably, (1) the consolidation, in 1930, of all federal agencies having to do with relief and other benefits provided by law for former members of the military and naval establishments, *i.e.*, the hitherto independent veterans' bureau, the pension bureau from the Interior Department, and the Soldiers' Home from the War Department, into a new agency known as the Veterans' Administration; and (2) the transfer, in the same year, of the bureau of prohibition from the Treasury to the Department of Justice. Minor readjustments of various sorts can always be made by the president, or even by a department head, independently. Major changes, however, require action by Congress; and it is Congress that, partly from inertia and indifference and partly from fear of losing patronage, still offers the chief obstacle to reorganization on broad and truly satisfactory lines. The subject is unfortunately not one on which the people at large are well informed, or in which they take a live interest—even though it has been estimated that as much as five hundred million dollars of their tax money could be saved every year if a thoroughgoing reform were carried out. One may hope, however, that enough popular support can be enlisted to enable President Hoover, or one of his early successors, to carry to completion a task to which every chief executive for a

<sup>1</sup> In April, 1929, the Institute for Government Research laid before the president a somewhat revised plan, a main feature of which was provision for a new executive department, to be known as the Department of Administration, and to bring together eleven agencies concerned primarily with running the government as a going concern (as distinguished from service-performing agencies), such as the bureau of the budget, the civil service commission, the personnel classification board, etc.

quarter of a century has professedly stood willing and ready to set his shoulder.<sup>1</sup>

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<sup>1</sup> The general subject is treated in L. M. Short, *Development of National Administrative Reorganization in the United States*, Chap. xxiii; K. A. Frederic, *An Introductory Study of Reorganization of the Federal Government* (Washington, 1930); and especially W. F. Willoughby, *The Reorganization of the Administrative Branch of the National Government* (Baltimore, 1923). Much information is presented in popular form in W. Hard, *Untangling the Government* (Washington, 1930), a series of reprints from *Nation's Business*. For discussion of the oft-made proposal to create a department of education, see *Annals Amer. Acad. of Polit. and Soc. Sci.*, CXXIX, 95-109 (Jan., 1927). This particular proposal has the backing of the National Education Association, the American Federation of Teachers, the National League of Women Voters, and many other organizations, as well as of individual educators in all parts of the country. It is, however, opposed by various organizations, and by many educators. The fundamental objection would seem to be that a coördinate "executive" department with little or no administrative work to perform would be an anomaly.



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## CHAPTER XIX

THE EXECUTIVE CIVIL SERVICE

President, heads of departments, under-secretaries and assistant secretaries, division heads and bureau chiefs—these and other directing officers at Washington form but an insignificant fraction of the army of men and women who, year in and year out, carry on the executive, administrative, and clerical work of the government. It is not they, but their subordinates, who collect revenues, take censuses, conduct research, compile statistics, keep accounts, deliver mail; and if it be imagined that the people who perform these humbler tasks are not an important part of the national machinery, the reply may be made that from many points of view they are the most important of all. To them it falls to bring the operations of the government closest to the people; upon their diligence and efficiency largely depends the adequacy of the whole national system as a going concern; problems and policies relating to them—in such matters as appointments, removals, promotions, classification, pay, pensions, and what not—are among the most vital and difficult with which political scientists, and practical lawmakers and administrators as well, have to deal. Nation, states, counties, cities, towns, and villages—all, as political areas, have no higher concern than intelligent, conscientious, business-like conduct of their affairs by their respective staffs of “civil servants.”

The executive civil service in the domain of the national government has grown from a few thousand persons a century ago into one of the hugest establishments of its kind in the world. It would be easily the largest of all were it not for the fact that under our federal system many activities that otherwise would fall to the national government are taken care of by the states. On June 30, 1916—shortly before the sudden increase made necessary by the country's entrance into the World War—the executive service numbered, in all, 438,057 officers and employees.<sup>1</sup> A maximum of 917,

<sup>1</sup> The "executive civil service," it should be noted, does not include the army, the navy, the marine corps, the coast guard, the employees of the District of Columbia, or persons attached to the judicial and legislative establishments.

760 was reached at the date of the armistice (November 11, 1918), after which there naturally was a reduction. Since 1921, the figure has fluctuated between 550,000 and 610,000, being on June 30, 1930, 608,915, or not far from one person out of every two hundred in the entire population of the country. Contrary to popular impression, this great force is not made up exclusively of "government clerks." It contains a vast array of scientists, *e.g.*, biologists, agriculturists, engineers (civil, electrical, hydraulic, mining, sanitary, and road), foresters, geologists, live-stock experts, entomologists, astronomers; an impressive corps of financiers, economists, and statisticians; a great body of experienced administrators. Furthermore, only a small proportion live and work in the national capital—in 1930, 68,510 as compared with the 540,405 constituting the "field service," the latter performing duties in all parts of the land, including the dependencies, and, in the case of the diplomatic and consular establishments, in foreign countries as well. More than 90,000 of the total number are women.

The first great questions that arise in connection with any civil service system are those of personnel. How are the members recruited? Are they appointed for reasons of merit, or otherwise? How are they classified, and how promoted? How are removals made, and why? In our national government, as in the states, the appointment and removal of civil servants has had a long and tortuous history; and much room for development still exists. In the beginning, Washington appointed men to the few positions then existing with regard only for their qualifications, as best he could ascertain them; and though the rise of political parties led his early successors to take political considerations into account in filling posts as they fell vacant, there were not many removals for political reasons—barring a certain number under Jefferson—until the days of Andrew Jackson. An act of 1820 fixing a four-year term for district attorneys, collectors of customs, and several other groups of officials, looked, however, to more frequent rotation in office;<sup>1</sup> and the election of Jackson to the presidency, in 1828, definitely opened the way for such a development. Jackson himself believed that prolonged tenure of office leads to laxness and corruption, and considered that, in any case, one man has as much right to public office as another; and he gave his views practical application, not indeed by making a "clean sweep" of anti-Jack-

<sup>1</sup> Later statutes brought many additional groups under the four-year rule, *e.g.*, all postmasters.

sonian office-holders, yet by removing many hundreds of officers and employees, of all grades, during his first year. The blame for fastening the spoils system upon the country is, however, not to be laid entirely, or even mainly, at Jackson's door. In the first place, the system was already prevalent in state and municipal governments, being now merely carried over into the national government.<sup>1</sup> In the second place, the tightening up of party machinery and the intensification of party politics would have led in any case, under the conditions then existing, to an increased use of public offices as rewards for party service. Finally, Jackson's views on office-holding, while abhorred by many people, were warmly endorsed by those forces of the new democracy, especially in the West and South, that had been chiefly responsible for his election. When, in 1832, William L. Marcy, a rising politician of New York, summed up the arguments of the Jacksonian forces in the remark, "To the victors belong the spoils," he coined a phrase that struck home;<sup>2</sup> removals, as well as appointments, for party reasons became part of the accepted order of things.

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Men, however, could not wholly close their eyes to the system's unfortunate consequences. Experienced and worthy public officials were ousted on all sides to make room for political henchmen. The public services were thrown into demoralization every time a change of administration took place. The president was harassed almost beyond endurance by place-seekers and their friends, and congressmen tended to become mere solicitors and dispensers of patronage. As early as 1853, Congress undertook, in a feeble way, to improve conditions by requiring that certain clerkships in Washington should be classified on a basis of compensation, and that candidates should be appointed to these positions only after examination by the head of the appropriate department. Even on this limited scale, the reform came to nothing; only "pass" examinations were required, and the administration of them soon grew very lax. After the Civil War, the need of a change of policy received fresh emphasis, and in 1871 Congress, with the approval of President Grant, passed an act authorizing the president to prescribe regulations for admission to the civil service and to ascertain the fitness of candidates. Grant thereupon appointed our first civil service commission. George William Curtis, a leading advocate

Beginnings  
of reform

<sup>1</sup> H. L. McBain, "DeWitt Clinton and the Origins of the Spoils System," *Columbia Univ. Studies in Hist., Econ., and Public Law*, XXVIII (1907).

<sup>2</sup> The phrase was used in a speech in the United States Senate. *Register of Debates in Congress*, VIII, Pt. 1, p. 1325.

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of the reform, was made chairman; and a system of competitive examinations, on a small scale, was introduced. Before the plan could be applied very widely, however, differences of opinion arose between the president and the commission, and in 1873 Curtis resigned. In 1875, furthermore, Congress refused to continue the necessary appropriation. The commission lived on, and in 1877 the examination system was revived for the postal and customs employees in New York City. But the general reform contemplated in the original legislation failed of realization.

The act  
of 1883

The cause was not lost. Able men turned their best energies to its support; national and state civil service reform associations were organized; recent reforms in Great Britain were investigated and made familiar to American readers.<sup>1</sup> *Harper's Weekly*, *The Nation*, and other influential journals took up the fight; political parties repeatedly put planks on the subject in their platforms; the assassination of President Garfield by a disappointed office-seeker in 1881 supplied dramatic impetus. The upshot was that, early in 1883, Congress passed a comprehensive civil service act<sup>2</sup>—commonly known as the Pendleton Act—which from that day until now has been the fundamental law governing admission to the national civil service. The rules made in pursuance of this measure have often been changed, and much additional legislation has been enacted on other civil service matters. But the broad provisions of the act of 1883, opening the way for the progressive extension of the merit system under regulations promulgated by the president, have never needed amendment.<sup>3</sup>

The  
classified  
service

Two main lines of procedure were contemplated in this epoch-marking measure. One was the progressive classification of clerks and other employees—first, in the Treasury and Post-Office departments, and afterwards, as the president should direct, in other departments as well. The second was the parallel extension to all such classified positions of the plan or principle of recruitment by competitive examination. At the outset, the reform did not extend far. In the first year, the number of positions affected did not ex-

<sup>1</sup> Especially through a book entitled *The Civil Service in Great Britain* (New York, 1880), written by an ardent reformer, Dorman B. Eaton, whom President Hayes commissioned to study the British system. After ineffectual preliminary steps, Great Britain adopted a comprehensive merit plan by an order in council of 1870. F. A. Ogg, *English Government and Politics*, Chap. x.

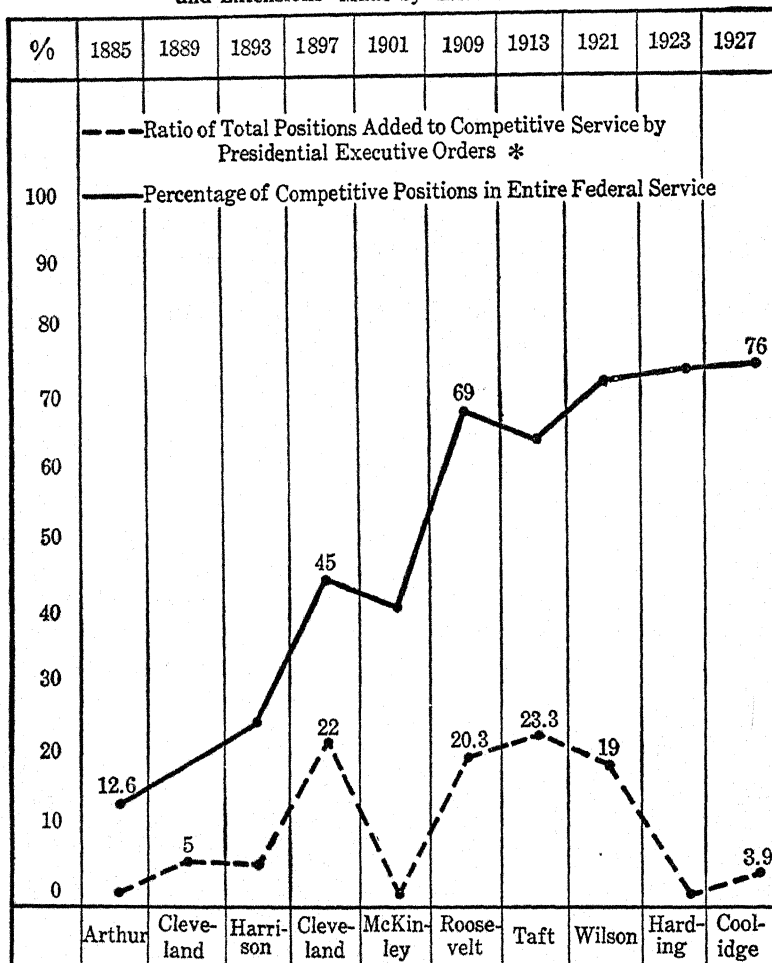
<sup>2</sup> *U. S. Stat. at Large*, XXII, 403-407.

<sup>3</sup> Similar legislation soon followed in Massachusetts and New York. By this time, one could affirm that the reform movement in public administration was definitely under way.

ceed 14,000. Gradually, however, the figure grew, not only absolutely, but as compared with the total force of federal employees. By 1897, it was 87,108; by 1905, it was 178,807; by 1916 (the last year before the abnormal increase of government employees on account of the World War), it was 296,926; and in 1930 it was 462,083, or approximately seventy-six per cent of the total. In part, the increase arose from occasional acts of Congress placing specified groups of positions, whether new or old, in the "classified service," *e.g.*, an act of 1902 classifying the employees in the census office and an act of 1927 creating the prohibition bureau in the Treasury Department (transferred in 1930 to the Department of Justice), and requiring that all employees of the bureau acquire a civil service status through the usual channels of competitive examination. In the main, however, the expansion arose from a long series of executive orders issued in pursuance of discretionary authority conferred by the Pendleton Act or supplementary statutes. Thus, President Harrison brought into the classified service the weather bureau and part of the Indian service; President Cleveland, numerous positions in the internal revenue service and in the Department of Agriculture; President Roosevelt, the rural free delivery employees and all fourth-class postmasters north of the Ohio and east of the Mississippi; President Taft, all remaining fourth-class postmasters and all assistant postmasters and clerks in first- and second-class post-offices; President Wilson, various income-tax employees and other groups; and President Hoover, in November, 1930, all positions in the government of the District of Columbia except the three District commissionerships. Aside from unskilled laborers at the bottom of the scale—to whom a merit system, in the technical meaning of the term, is not clearly applicable—the principal groups that have not yet been brought into the classified service are (1) incumbents of some 17,000 "presidential" offices—that is to say, offices filled by appointment by the president and Senate, such as higher positions in the foreign service and first-, second-, and third-class postmasterships, and (2) about 12,000 holders of positions specially excepted by law or presidential order, *e.g.*, deputy collectors of internal revenue.

The object of the act of 1883, and of the long line of supplementary statutes and executive orders, has been, of course, to secure appointment on a basis of demonstrated fitness, coupled with security of tenure during satisfactory service. To aid the president and other appointing authorities in realizing these pur-

Growth of the Competitive Classified Service in the National Government  
and Extensions Made by Executive Order



\* Total extensions made by executive order since 1883 represents 100%. Each president's contribution represents a percentage of this total.

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poses, there exists a special piece of machinery, which naturally is not attached to or under the control of any one of the departments. This is the Civil Service Commission—a board of three appointed by the president and Senate, under the requirement that not more than two members shall be “adherents of the same party.”<sup>1</sup> A staff of some three hundred and seventy-five persons—examiners, clerks, a director of personnel research, etc.—is maintained in Washington; the country (including the insular dependencies) is divided into thirteen civil service districts, each in charge of a manager appointed by the commission; and the machinery is completed by some 5,000 local examining boards, made up of collectors of revenue and other national officers who are called into special service for this purpose from time to time by the commission, without extra pay. The law requires that examining boards shall be set up at sufficiently numerous places to enable candidates to attend examinations without undue expense or loss of time; and the greater part of the field positions are filled from registers kept, not at Washington, but at the district offices.<sup>2</sup>

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The steadily increasing numbers of officials and employees belonging to the classified service are affected by the laws and orders relating to that service in three principal respects, namely, as to appointment, tenure, and promotion. With the exception of relatively few posts, appointments are made only on the basis of the showing of candidates in competitive examinations. These tests are arranged for by the commission, announced in advance in newspapers and on placards displayed in post-offices and other public places, and administered in various cities throughout the country

Examina-  
tions

<sup>1</sup> Numerous other federal agencies (some of which will be described presently) have to do, in one way or another, with personnel work in the service. These include the bureau of efficiency, the personnel classification board, the bureau of the budget, the comptroller-general, the employees' compensation commission, the pension bureau, the Post-Office Department (to which the Civil Service Commission has delegated a large amount of its field work), not to mention various labor boards which have certain functions in connection with the classification and compensation of positions in the navy yards, etc. Much duplication and confusion result—including a good deal of uncorrelated legislation—and there is a growing demand for more integration, perhaps complete centralization under a single agency. See “How the Federal Government Handles its Personnel Work,” *The Public Business*, I, Nos. 7-8 (Dec.-Jan., 1926-27). The Civil Service Commission has considerably less authority than is given to similar agencies in many states and cities. It is also inadequately financed. The best account is D. H. Smith, “The United States Civil Service Commission,” *Service Monographs*, No. 49 (Baltimore, 1928).

<sup>2</sup> From *Information for Boards of Examiners and Nominating Officers Concerning Applications, Examinations, and Appointments* (Washington, Govt. Printing Office, 1930) one may learn precisely how the system works.



by the examining boards. They may be either written or unwritten, or both. Candidates for the great bulk of positions of a clerical or other subordinate character are examined in groups, and exclusively in writing; those seeking positions which call for scientific, technical, or other special attainments are rated competitively in respect to experience, education, training, and fitness, as ascertained usually by interviews and testimony rather than by a formal written examination. In the one case, the examination is said to be "assembled;" in the other, "non-assembled." In the preparation of examination questions, the commission enlists the aid of experienced persons in the several departments, and occasionally of outside experts.

Contrast of  
American  
and English  
systems

The law requires examinations to be "practical in their character," and, so far as possible, to "relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed." Herein our American system differs sharply from the English system. In England, the competitive principle is carried nearer to the top of the government service than with us; public service is looked upon to a greater extent as a profession, and even a career; and the main object of the examination system is to recruit the service from young men and women who expect to spend their lives in the public employ, and whose education and native ability make it probable that they will rise from one grade to another and steadily grow in usefulness as administrators. Hence, English examinations are framed mainly with a view to testing the candidate's general attainments, and especially his intellectual capacity. Mathematics, history, philosophy, the classics, natural science—these and other branches of higher learning enter prominently. Even the examinations for positions of a purely clerical nature are conducted on this principle, although naturally they are based upon more elementary subjects. Under the American plan, the object is not, except in a rather incidental way, to test general attainments and capacity. It is, rather, to ascertain the applicant's technical proficiency and present fitness for the kind of work that he seeks.<sup>1</sup> "The result is startling. In England, the highest positions are filled by examinations as difficult as the honor examinations in the best universities, while the lower posi-

<sup>1</sup> Even so, the complaint is often heard that our examinations are too "scholastic" or academic. See a reply to this charge by Chief Examiner Wales, *Thirtieth Annual Report of U. S. Civil Service Commission* (1913), 28-29.

tions require considerably more training than is obtained in the average American high school. As a result, the English service attracts to it a highly educated class, untrained it is true in the technical duties of their positions, but fitted to develop into very useful and able officials. In the United States, the examinations, except for the positions requiring scientific or technical knowledge, in general require not much more than the ordinary high-school education, together with some technical proficiency. As a result, the candidates do not have the education and general ability of the English officials and are frequently men of less capacity than are found in private enterprises."<sup>1</sup>

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Formerly, aliens were permitted to take the examinations, and occasionally they received appointments. Examinations nowadays, however, are open only to citizens, except in the rare event of a lack of citizen applicants. There is no fee; and the number of persons examined is always far in excess of the number of places to be filled.<sup>2</sup>

On the registers of the Civil Service Commission, at Washington and in the offices of the district secretaries, are kept the names of all persons who have passed the various examinations with an average grade of seventy. Appointment, of course, withdraws a name from the list. But after a year the name of any person not receiving appointment is stricken off in any event, to be restored only if a new examination is passed successfully. When a clerk or stenographer or other employee in the classified service is needed by a department, the commission supplies the appointing officer with the names of three persons who stand highest in the appropriate list of eligibles. The officer appoints one of the three, and the other two resume their places on the waiting list. If no one of the three is appointed, the officer must be prepared to assign some good reason when asking for more names. Every appointee is put on probation for a period of six months (or longer, if the commission and department agree), and the appointment becomes definitive only if he is retained beyond that time. The free working of these arrangements is, however, obstructed by certain special statutory provisions. War veterans (including those who saw serv-

How ap-  
pointments  
are made

<sup>1</sup> E. Kimball, *National Government in the United States*, 229. The English and American systems are further compared in R. Moses, "The Civil Service of Great Britain," *Columbia Univ. Studies in Hist., Econ., and Public Law*, LVII, No. 1 (1914), Chap. ix.

<sup>2</sup> Thus in the fiscal year ending June 30, 1930, a total of 287,357 persons were examined, while only 44,719 received appointment.

ice in the World War), if honorably discharged, are exempted from various requirements, and in particular are given the advantage of having five points arbitrarily added to their earned ratings—ten points in the case of disabled veterans.<sup>1</sup> Indeed, under an executive order of March 2, 1929, disabled veterans are certified ahead of veterans not disabled and non-veterans, regardless of their ratings. Figures for recent years show that about one-fourth of all appointments in the classified service now go to "preference eligibles" on the veteran basis. Furthermore, effort is made to carry out the injunction of the Pendleton Act that, "as nearly as the conditions of good administration will warrant," appointments in the departments at Washington shall be apportioned among the several states and territories upon a basis of population. Shortage of eligibles from many states precludes anything approaching exact apportionment; nevertheless, the rule, even as partially applied, is responsible for the appointment of many persons of inferior rating.

Protection  
against  
removal

An essential feature of the merit system is security of tenure. There is, of course, no complete immunity from removal. The courts have held repeatedly that, the power to remove being an incident of the power to appoint, that power is not to be regarded as wholly cut off by any regulations that Congress or the Civil Service Commission may make. But no official or employee in the classified service may be removed for refusal to render political, *i.e.*, party, service or to contribute to a political fund; and an act of 1912, incorporating an earlier rule of the Civil Service Commission, stipulates that no person in the competitive service shall be removed except "for such cause as will promote the efficiency of the service." It is open to the president or other appointing authority to remove any one of his appointees whom he judges to be inefficient, dishonest, or otherwise a hindrance to good administration. The reasons for the action must be given in writing, and the person whose removal is proposed must be allowed an opportunity to answer in writing any charges brought against him. He cannot, however, demand a hearing before dismissal takes effect, as is commonly permitted in state and municipal civil service systems.

Restraints  
on political  
activity

In practice, the merit laws, upheld by a reasonably enlightened public opinion and by a high sense of honor on the part of most

<sup>1</sup> Ten points also in the case of widows of veterans and wives of veterans who themselves are physically disqualified for government employment.

presidents and other appointing authorities, give members of the classified service substantial assurance of being retained as long as their work is performed satisfactorily. In return for this protection, one main requirement—in addition to efficient discharge of duty—is made of them, namely, that they shall abstain from partisan activities. They are not disfranchised, and they are at liberty to talk privately about political matters. But they may not use their official authority or influence to coerce the political action of any person or body, or to interfere with an election or influence the results thereof; and they may not solicit or receive contributions for political purposes from any national officer or employee. Furthermore, under an executive order of 1907, members of the classified service may “take no active part in political management or in political campaigns”—a rule which has been construed by the Civil Service Commission to forbid membership in party conventions, addressing party caucuses, conventions, or other gatherings, participating in the preparation of party resolutions or platforms, serving on party committees, giving public expression to political views, assisting in getting out the voters on election day, serving as an election officer, distributing campaign literature or emblems, publishing anything in the interest of a particular candidate or party, and a long list of other activities having a partisan aspect.<sup>1</sup> Alleged violations of any of these regulations by members of the competitive service are subject to investigation by the commission, and many cases are looked into and reported upon every year.<sup>2</sup> The commission itself, however, has no power of removal; and it has frequently complained that its recommendations have not been carried out by the authorities vested with that power. Officers who stand outside of the classified service, *e.g.*, the heads of departments, are not forbidden to engage in political activity; and, in the case of at least those who have to do with the determination of policy, this is a reasonable and necessary exemption. The latitude that is allowed is, however, often abused, and it would be beneficial if the Civil Service Commission were given, in accordance with its repeated recommendations, the same right

<sup>1</sup> *Thirty-third Annual Report of the Civil Service Commission* (1916), 35-36.

<sup>2</sup> In the fiscal year ending June 30, 1930, 91 cases of alleged political activity came before the commission. Investigation led to recommendation that 25 employees be dropped, that 33 be reprimanded or warned, and that 8 be suspended or reduced in salary. In 25 cases, the charges were not sustained. On the general subject, see *Information Concerning Political Assessments and Partisan Activity of Federal Office-holders and Employees* (Washington, Govt. Printing Office, 1926).

to investigate and report on cases of alleged excessive political activity outside of the classified service that it has long exercised inside that service.

An essential feature of any satisfactory civil service system is a scheme of promotion on the basis of merit. The act of 1883 provides that no person shall be promoted in the classified service "until he has passed an examination," or is shown to be specially exempted from such examination by law; and at suitable intervals formal competitive examinations for promotion are held. Experience, however, has taught that the fairest and best basis of promotions is not set examinations, however searching, but continuous records of employees' diligence, punctuality, faithfulness, resourcefulness, and accuracy. Accordingly, an act of 1912 required the Civil Service Commission to establish a system of "efficiency ratings" for the classified service in the District of Columbia, such ratings to be based on efficiency records systematically kept in the several departments, and to be used by appointing officers—along with the results of such examinations as might be held—in authorizing promotions.

A "division of efficiency," created simultaneously as an arm of the Civil Service Commission, became, in 1916, an independent bureau of efficiency, charged with receiving, tabulating, and making constantly available the efficiency records of federal employees in the District of Columbia, and with investigating the personnel needs of the several departments and independent establishments, as well as the business methods of the government generally.<sup>1</sup> Perhaps because of the difficulty of its task, the bureau started off inauspiciously, and throughout its history it has been subject to a large amount of criticism. In later years, however, it has done good work. Minimum ratings have been prescribed which must be attained by an employee before he can be promoted; also ratings below which he cannot fall without being demoted, and still others which automatically entail dismissal. Duplication of work in various departments has been ferreted out and eliminated; retirement systems and business methods have been studied; and assistance has been rendered the personnel classification board in classifying positions throughout the departmental service. On the whole, however, promotional procedure is a phase

<sup>1</sup> In 1928, the bureau's investigative duties were extended to cover the municipal government of the District of Columbia. The "field" service throughout the country is still not included.

of our civil service system in which relatively little advance has been made.<sup>1</sup>

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Problem of  
extending  
the merit  
system  
upwards

The further improvement of the executive civil service presents a number of difficult problems. First may be mentioned the extension of the classified service, with merit appointments and promotions, to include important groups of positions not now reached. We have noted that in England the competitive system is carried well toward the topmost levels of the service; in the departments, the dividing line is between the "permanent" under-secretaries, who commonly attain their positions by promotion based on ascertained merit, and the "parliamentary" under-secretaries, who, ranking as ministers, are properly enough appointed on a party basis. In our own country, there is no such clear dividing line, but at all events the merit system terminates decidedly farther down. The heads of departments are, or at least may be, appointed on a party basis. The same is true of assistant secretaries, and to a large extent of heads of bureaus, divisions, and other units, although the increase in the number of scientific bureaus (notably in the Department of Agriculture) in recent years has steadily enlarged the number of bureau chiefs who, originally selected mainly for their professional standing, hold office virtually on good behavior, though nominally removable at the pleasure of the president.<sup>2</sup>

Outside of Washington, the principal officers in large portions of the executive service still stand outside the merit system, e.g., in the customs service, the internal revenue service, the mint and assay services, the public lands service, the reclamation service, the immigration service, and the field services of the Department of Justice, including the district attorneys and marshals. Appointments to practically all of these higher positions are made by the president and Senate, and the president has no power to put them in the classified service; although there is nothing to prevent him from setting up a system of tests by which to determine what men he will nominate to the Senate for any of the places in question—a thing which President Wilson, in 1917, actually did in connec-

<sup>1</sup> G. A. Weber, *Organized Efforts for the Improvement of Methods of Administration in the United States*, 104-113; L. D. White, *Introduction to the Study of Public Administration*, Chap. XIV; "The Personnel Work of the U. S. Bureau of Efficiency," *The Public Business*, II, Nos. 5-6 (Oct.-Nov., 1927); *Annual Report of the Bureau of Efficiency*.

<sup>2</sup> A. W. Macmahon, "Bureau Chiefs in the National Administration of the United States," *Amer. Polit. Sci. Rev.*, XX, 548-582, 770-811 (Aug., Nov., 1926). Cf. *ibid.*, XXIII, 383-403 (May, 1929).

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Congress  
necessary

tion with the eleven thousand first-, second-, and third-class postmasterships, after Congress had failed to pass a law putting these positions in the competitive classified service.<sup>1</sup> Full incorporation of such groups of officials in the classified service could be accomplished only by act of Congress abrogating the "advice and consent of the Senate" and vesting the appointments in the president alone, or, perhaps better, in the heads of departments, accompanied by an abrogation of the four-year term (or other fixed term) in so far as it now applies. Unquestionably, such action—twice recommended by President Taft in 1912, endorsed in principle by President Harding, recommended by President Coolidge in 1924, and repeatedly urged by the Civil Service Commission and organizations like the National Civil Service Reform League—would yield great practical benefits, both in relieving the president of the irksome task of passing upon thousands of candidates of whom he can have no personal knowledge and in conserving the time and energy of the Senate. But equally certain is it, as shown by the fate of various bills on the subject, that the reform would be difficult to bring about. Politicians, particularly in the Senate, have always been pretty solidly against it. For the present, more is to be expected from voluntary executive action; although, obviously, a reform resting on this basis is less stable and secure than one resting on the mandate of civil service law.

Need of  
such ex-  
tension

However accomplished, the reform is greatly needed. Economy and efficiency throughout the executive service depend very largely on the capacity and experience of these higher officers; political appointments at these levels have a demoralizing effect on the service from top to bottom; with these superior positions on a political basis, subordinates have little incentive to try to work up, no adequate plan of promotions is possible, and the civil service cannot be made a career, capable of attracting men and women of caliber, as it is in England and other European countries.<sup>2</sup>

<sup>1</sup> Under executive order of May 10, 1921, open competitive examinations are now given in connection with all of the approximately 15,600 postmaster-ships of these three classes, but, of course, only as a preliminary to presidential nomination to the Senate. Selection among the highest three eligibles in each case is really made by the postmaster-general. For the order of 1921 and later revisions, see *Annual Report of the U. S. Civil Service Commission* (1929), pp. 71-72.

<sup>2</sup> The Civil Service Commission testifies that the number of graduates of higher institutions applying for examination has fallen off, and the lack of opportunity for merited advancement is assigned as a principal reason. In recent years, the Commission has sought to establish closer relations with colleges and universities in an effort to attract junior technical, professional, and scientific workers such as chemists and engineers. Some two hun-

Unquestionably, such officers as have to do in any important way with policy-framing, *e.g.*, the heads of departments, ought to continue to be selected as now, with a view to harmony in administration circles; and, admittedly, candidates for the higher posts cannot be tested satisfactorily in the same way that applicants for admission to the inferior grades of the service are examined. But most of the officials referred to have nothing to do with the determination of policy; and there are well-known and adequate modes of ascertaining the fitness of candidates, no less for places of heavy responsibility in the government service than for positions of trust in great banking and business establishments.<sup>1</sup>

Another problem of much seriousness which has only lately been put in process of satisfactory solution is that of proper financial provision for government employees—compensation during service and pensions after retirement. Partly because of a somewhat scornful attitude toward the appointed official or employee as a “feeder at the public crib,” partly because of the decentralized and haphazard method of handling appropriations, Congress never until recent years took seriously the oft-repeated admonition of the Civil Service Commission that a comprehensive, coördinated, and stable salary scale ought to be installed. Speaking broadly, compensation has been sufficiently liberal at entrance into the service; and for this reason, as well as because of the lure of public employment, there has ordinarily been little difficulty in recruiting as many beginners as are needed. Compensation higher up in the ranks, has, however, been progressively inadequate, at all events within the range of the competitive service; and the rates for the higher technical and supervisory posts have been, in many instances, absurdly low. As a result, able and ambitious young men have been deterred from seeking to enter the service; employees of long standing have found themselves underpaid, in comparison with employees of equivalent experience in private business; and

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Salaries

dred government employees who have occasion to visit educational institutions in connection with their regular work are employed as special recruiting agents.

<sup>1</sup> In its annual reports, the Civil Service Commission strongly urges the extension of the classified service to include all positions, with few exceptions, which do not involve the determination of administrative policies, and which are part of the permanent operating force of the government. See, for example, *Report* (1921), pp. xii-xiv. Cf. J. A. McIlhenny, “The Merit System and the Higher Offices,” *Amer. Polit. Sci. Rev.*, XI, 461-472 (Aug., 1917). For an illustration of the bad results of the spoils system as applied to superior technical positions, see R. M. Boekel, “The Davis Case,” *Good Government*, XL, No. 10 (Oct., 1923). Other instances are mentioned in the articles by Macmahon cited on p. 395, note 2, above.



the whole service has suffered in quality and morale. Furthermore, there has been gross injustice, in that by reason of the many separate government services operating under different laws, an employee in one service might be receiving only half as much as an employee in another service with the same title and doing the same kind of work equally well.

Under the auspices of a joint congressional commission on reclassification of salaries in the departments in Washington, appointed in 1919, and of a separate commission of the same sort on the postal service, a full study of this subject was finally made and a plan of standardization presented to Congress;<sup>1</sup> and in 1923 a classification act became law which, although it did not follow the commission's recommendations, was hailed as paving the way for a substantial rectification of salary deficiencies and inequalities.<sup>2</sup> The measure set up a personnel classification board, to be composed of the director of the bureau of the budget, a member of the Civil Service Commission, and the chief of the bureau of efficiency (or an alternate designated by each of these respectively),<sup>3</sup> and it was made the duty of this body to work out an inventory of the classified personnel in the District of Columbia, grouping together all positions involving the same type of work in any part of the public service and assigning appropriate salary ranges, within the terms of the act, to each class or grade of positions.<sup>4</sup> Existing statutory salaries were abolished; regular salary increases in each class and grade were provided for, upon the attainment and maintenance of requisite efficiency ratings, the records of which were to be accessible to the employee; and women were promised equal pay with men for equal work. It was made the duty of the board, furthermore, to carry out a survey of the field services and report to Congress schedules of positions, grades, and salaries for such services, employing the scheme utilized for the District of Columbia in so far as found applicable. Unhappily, the activities

<sup>1</sup> Report of the Congressional Joint Commission on Reclassification of Salaries, 66th Cong., 2nd Sess., House Doc. No. 686 (March 12, 1920).

<sup>2</sup> 43 U. S. Stat. at Large, 950; *Fortieth Annual Report of U. S. Civil Service Commission* (1923), pp. 127-135.

<sup>3</sup> In practice, the board has always consisted of alternates.

<sup>4</sup> The act supplied the general framework for the classification, as follows:

Character of service	No. of grades	Salary range
1. Professional and scientific .....	7	\$1,860 to \$7,000
2. Sub-professional .....	8	900 to 3,000
3. Clerical, administrative, and fiscal..	14	1,140 to 7,500
4. Custodial .....	10	600 to 3,000
5. Clerical—mechanical .....	5	45-50 to 80-90 cents an hr.

of the new board almost immediately became involved in sharp controversy, and the intended improvements have thus far been realized only in part. An investigation of the situation, indeed, prompted the House of Representatives to pass a bill in 1924 undertaking to suppress the board altogether, and to transfer its functions to the Civil Service Commission. The bill did not become law, and the board survives. But such surveys of the field services as have been carried out have not been made effective, and, speaking broadly, the country is still without a classification system worthy of the name.<sup>1</sup>

With a view to meeting the pressing problem of the superannuated employee, Congress in 1920 passed a retirement act (amended in 1926 and 1930) creating a compulsory part-contributory pension system for all employees in the classified service. The government deducts three and one-half per cent of the salary or other compensation of such employees, puts one dollar a month for each employee into a "civil service retirement and disability fund," and itself adds to the fund thus created such amounts as may be necessary to enable it to pay retiring annuities on a sliding scale fixed in the act.<sup>2</sup> The retirement age for railway postal clerks is sixty, for city and rural letter carriers, post-office clerks, and mechanics, sixty-three, and for all other employees, sixty-eight. When an employee reaches the specified age, he is automatically separated from the service, unless recommended by his department and certified by the Civil Service Commission for continuance.<sup>3</sup> If he has served less than five years, he gets nothing. But if he has served at least that long, he is entitled to an annuity, ranging, according to the length of his service, from thirty per cent to sixty per cent of his average salary for the last ten years, reaching a maximum of \$1,200 per annum where the period of service has been thirty years or more. There is also provision for annuities

Pension  
system

<sup>1</sup> Report of Special Committee on the Personnel Classification Board, 68th Cong., 1st Sess., House Report No. 315 (1925); "The Work of the Personnel Classification Board," *The Public Business*, Dec., 1927-Jan., 1928. Under the Welsh Act of May 28, 1928, the board entered upon a fresh survey of portions of the field service. A report of progress was made in 1929 ("Report of Wage and Personnel Survey," 70th Cong., 2nd Sess., House Doc. No. 602).

<sup>2</sup> The remainder of the three and one-half per cent, with compounded interest at four per cent, is applied to the purchase of an additional, or insurance, annuity.

<sup>3</sup> Fully ninety-five per cent of all employees in the departments, on arrival at retirement age, desire to remain at work if at all able to do so. On the other hand, almost twenty-one per cent of all ex-employees in receipt of pensions are retired for total disability before reaching the normal retirement age. The Civil Service Commission favors a flat retirement age of sixty.

for employees who, before reaching the retiring age, and through no fault of their own, become "totally disabled for useful and efficient service." The system, especially as liberalized in 1930, gives all grades of employees reasonable assurance against dependency in ill-health and old age, and brings the United States abreast of the principal European countries in making provision for the multitude of men and women who spend their lives doing the government's routine work with little or no prospect of promotion or other betterment.<sup>1</sup>

Organiza-  
tion of  
public  
employees

France, Italy, and other European states have at times been embarrassed, and even imperilled, by strikes engaged in by public employees organized in unions and coöperating more or less closely with unionized workmen in private industry. The United States has thus far escaped difficulty of this nature—not because our public employees lack organization, but because their unions are under agreement not to strike against the government and thereby tie up the public services. Organization of federal employees began in the postal service some forty years ago. Letter carriers organized nationally in 1889, railway mail clerks in 1891, post-office clerks in 1900. At first, these societies, being merely fraternal in their aims, were encouraged and largely controlled by the superior officers of the Post-Office Department. But when, beginning in 1898, they undertook to influence Congress to pass measures raising the scale of pay, they lost favor with the authorities; and in 1902 President Roosevelt issued an executive order forbidding all officers and employees, on penalty of dismissal from the government service, "either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence, in their own interest, any other legislation whatever . . . save through the heads of departments, under or in which they serve."<sup>2</sup> Even after being made more stringent in 1908, this "gag" rule proved not entirely effective. But it stirred so much complaint that in 1912 Congress passed an act unconditionally recognizing the right of federal employees to petition Congress or

<sup>1</sup> *The Retirement Act as Amended . . . May 29, 1930* (Washington, Govt. Printing Office, 1930). Cf. M. Conover, "Pensions for Public Employees," *Amer. Polit. Sci. Rev.*, XV, 350-365 (Aug., 1921); J. T. Doyle, "The Federal Civil Service Retirement Law," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 330-338 (May, 1924); L. Meriam, *Principles Governing the Retirement of Public Employees* (New York, 1918). Retirement systems of American states and cities, and of several European countries, are described in "Public Service Retirement Systems," *Bull. of U. S. Bureau of Labor Statistics*, No. 477 (Jan., 1929).

<sup>2</sup> *Nineteenth Report of U. S. Civil Service Commission* (1902), p. 75.

any member thereof, and also conceding the right of their organizations to affiliate with unions outside of the public service, so long as such relationship does not entail any purpose or obligation to strike.<sup>1</sup> Framed with reference primarily to the postal service, this measure voices the policy of the government in connection with all parts of the civil establishment at the present day.

The organization of employees has gone forward so rapidly that nowadays fully three-fourths of the entire number belong to one sort of association or another. Every important group of postal employees, including even the presidential postmasters, has its national organization, embracing usually ninety per cent of its potential strength. A National Federation of Federal Employees, formed in 1917, links up hundreds of local unions of federal employees, composed of persons engaged in all services exclusive of the separately organized postal branch; and thousands of employees engaged in mechanical trades, *e.g.*, printers, carpenters, and plumbers, belong to the regular unions maintained by their fellow-craftsmen. Furthermore, all of the postal organizations, the National Federation of Federal Employees, and of course practically all of the labor unions to which the mechanical employees belong, are affiliated with the American Federation of Labor; although in the case of some of the postal unions the connection is not very close. Acting, as a rule, separately, yet on harmonious lines, and often with vigorous support from the officials of the American Federation, the postal unions and the National Federation petition Congress and lobby among the members in behalf of ameliorative legislation affecting hours, wages, retirement, and conditions of work; they seek to stimulate popular sentiment favorable to such legislation; they confer with the Civil Service Commission, and with representatives of the executive branch of the government, in quest of favorable adjustments of grievances; and they—especially the leaders of the National Federation—do not hesitate to use their influence, and even to “campaign,” against unfriendly congressmen seeking reelection. In this last activity, they often have the backing of the American Federation of Labor; and in the growing tendency of the organizations to turn their power into political channels some people believe they see an advancing menace.<sup>2</sup>

<sup>1</sup> 37 U. S. Stat. at Large, 583.

<sup>2</sup> L. Mayers, *The Federal Service*, Chap. xvi; L. D. White, *Introduction to the Study of Public Administration*, Chap. xvii; S. Spero, *The Labor Movement in a Governmental Industry; a Study of Employee Organization in the Postal Service* (New York, 1924).

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## CHAPTER XX

### THE STRUCTURE OF CONGRESS

The easiest decision that the architects of the constitution had a chance to make was to provide for a national legislature or congress. Then, as now, a representative assembly was considered an indispensable feature of any scheme of republican government. Besides, for thirteen years there had been an American congress—of a sort—and the very body which drew up the constitution itself sat by virtue of congressional authority. To the proposed Congress could not be assigned quite the importance that attached to the British Parliament; for, whereas Parliament was a supreme and legally omnipotent embodiment of national authority, Congress was planned to form only one of three coördinate branches of a government which itself was to be custodian of only limited and enumerated powers. Nevertheless, wide and potentially expanding law-making functions were conferred upon it, and, in addition, multifarious powers in relation to election of the president and vice-president, appointments, treaty-making, war, impeachment, and even the amending of the constitution. Congress is indeed the legislative branch, but it does a great deal more than merely make laws.

The place  
of Congress  
in the gov-  
ernmental  
system

Aside from questions of power, the main problem in 1787 was as to whether to provide for a congress of two houses or of only one, and if of two, how each should be made up. The decision was in favor of two, and for a number of very good reasons. In the first place, almost all precedent, except that of the existing Congress, pointed in that direction. The British Parliament consisted of the House of Commons and the House of Lords. Most of the colonies had had two legislative chambers. All of the new state constitutions except those of Pennsylvania and Georgia provided for a relatively large, popularly chosen, lower house and a smaller, more conservative, upper house. And, on the whole, the plan had worked well. In the next place, it seemed to many persons unwise to entrust to a single popularly elected body such greatly increased powers as it was now proposed to confer. A second chamber,

Why a bi-  
cameral  
plan was  
adopted

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planned to be more conservative than the first, would serve as a wholesome check upon hasty, prejudiced, or other ill-advised legislation. Finally, strong practical reasons appeared for creating two houses. The conflict that arose in the convention between the small and large states has been described.<sup>1</sup> It might conceivably have put an end to the deliberations and frustrated all hope of a stronger union. The step that chiefly averted this disaster was the adoption of the so-called Connecticut compromise, under which the states were to be represented according to numbers in a lower house, but on a footing of equality in an upper house. Only in the organization of the Senate was found a practical way, not merely of saying that the states were equal, but of giving them a tangible and permanent guarantee of such equality.

The bicameral system useful in the national government

Events have justified the decision. We shall see that in the field of local government the bicameral principle is of doubtful value, for the reason that, in the main, legislative action does not there extend to matters affecting life, liberty, or other fundamental interests and rights. The plan is not followed in English local government, and it has been largely abandoned in city government in our own country, where formerly it was almost universal. Of late, it has been brought into question, too, as applied to our state legislatures. But in connection with Congress it is commonly regarded as a very desirable arrangement, even if not in all instances for precisely the same reasons that figured a hundred and forty years ago. There are, of course, drawbacks: the existence of two houses produces deadlocks and delays which are not always for the good of the country, and sometimes it tends to an unfortunate division of responsibility. But the political system is made more stable; legislation on mere impulse is curbed; measures commonly receive consideration from more different angles than otherwise would be the case; and—now that the upper as well as the lower house is elected directly by the people—the plan imposes no serious restraints on the influence of public opinion. The kind of representation for which the Senate provides is different from, but hardly less desirable than, the kind provided for in the House.

The House of Representatives

How this comes about will appear if we look into the composition of the two branches. In contrast with both the president and the Senate, the House of Representatives was intended to be an organ of government directly representing the general body of the people; and accordingly the constitution provides that the mem-

<sup>1</sup> See p. 91 above.

bers shall be elected "by the people of the several states." Under a unitary form of government, such as prevails in England and France, members of the popular branch of the legislature are chosen in accordance with uniform suffrage regulations, which are laid down by national laws. In some federally-organized states, also, this is the case; in the former German empire, members of the Reichstag were elected under a single Imperial suffrage law, notwithstanding wide differences in the suffrage systems of the states; and the same is true in the present German republic. A different plan, however, prevails in the United States. No uniform national suffrage system has ever been set up here, either by the constitution or by law. The constitution requires only that for purposes of congressional elections "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature;"<sup>1</sup> so that, whoever is entitled under the constitution and laws of any given state to vote for a member of the lower branch of the legislature of that state, is *ipso facto* qualified to vote in that state for a member of Congress. Under the Fifteenth Amendment, a state may not withhold the right to vote on account of race, color, or previous condition of servitude, and under the Nineteenth, on the ground of sex. But these restrictions are general, and do not apply to congressional elections any more than to others. In an earlier chapter, we have seen that suffrage regulations vary greatly from state to state—that literacy tests are imposed here and tax-paying qualifications there; that periods of residence differ, and also requirements for registration.<sup>2</sup>

Although a broadly national, popular body, the House is further constructed with reference to state lines. Every representative is elected within a given state, and every state has, as such, a definite quota of members. Provisional quotas were assigned in the constitution, as originally adopted, to serve until a census could be taken; and thereafter representatives were to be apportioned among the several states "according to their respective numbers," which were to be computed by "adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."<sup>3</sup> The "other persons" referred to were, of course, slaves; and this clause, as has been pointed out, formed one of the important com-

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By whom  
elected

Basis of  
apportion-  
ment of  
members

<sup>1</sup> Art. I, § 2, cl. 1. The Seventeenth Amendment extends this provision to the election of senators.

<sup>2</sup> See Chap. XI above.

<sup>3</sup> Art. I, § 2, cl. 3.



promises of the constitution.<sup>1</sup> Upon the abolition of slavery, the three-fifths provision became obsolete; and the constitution now provides simply, in the Fourteenth Amendment, for apportionment among the states "according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." It also provides for a reduction in the representation of any state which withholds voting privileges from adult male citizens of the United States "except for participation in rebellion, or other crime." Many states are, and have long been, liable to this penalty; but for a variety of reasons, chiefly of a partisan character, no serious attempt at enforcement has ever been made.<sup>2</sup>

The constitution does not expressly say that representation in the House shall be reapportioned after each decennial census, but that is clearly what it means; and until the enumeration of 1920, Congress never failed to take the necessary action—usually after an interval of not more than one or two years. The procedure followed varied somewhat on different occasions, but in any case Congress scrutinized the census figures, decided how many members the House should have during the ensuing decade, and, having allotted these among the states as equitably as it could, so that each state would have at least one seat and as many more as its population entitled it to, passed an act putting the new arrangements into effect. It is curious to observe that one of the grounds on which the constitution was opposed during the debates on ratification was that the House of Representatives would be too small; one of the best-known papers in *The Federalist* was devoted entirely to answering that objection.<sup>3</sup> No longer is there any apprehension on that score; on the contrary, the House has grown to such size (435) that most observers regard it as unwieldy, and a level-headed senator who had served in the House could say in 1928 that he would rather see the constitutional provision for reapportionment entirely ignored than see any more members added.<sup>4</sup> Starting with 65 in 1789, the membership rose almost at once, after the census of 1790, to 103. Following other censuses, it mounted

<sup>1</sup> See p. 91 above.

<sup>2</sup> See p. 194 above. In February, 1931, the House judiciary committee reported favorably a resolution for a constitutional amendment excluding aliens from the count of population for purposes of a reapportionment of seats in the House. The effect would, of course, be to reduce the representation of states containing urban centers with large numbers of unnaturalized inhabitants.

<sup>3</sup> No. LVII (Lodge's ed., 350-355).

<sup>4</sup> Theodore Burton, in *Congressional Record*, LXIX, p. 9296.

as follows: 1820, 213; 1870, 292; 1880, 325; 1890, 356; 1900, 386; 1910, 435. Until 1930, every reapportionment in our history except one<sup>1</sup> brought a substantial increase. The reasons are not difficult to discover. One is the expansion of the country itself, resulting in the admission of new states, each entitled to a quota of representatives. But more important has been the natural reluctance of states to see their quotas of representatives reduced to make room for increased representation of faster growing states. The only way of preventing such reductions was to keep the ratio of population to membership relatively low—which, of course, meant a substantial increase, at every reapportionment, of members from rapidly growing states. Still another obstacle was the natural unwillingness of members to legislate themselves or their colleagues out of districts. It must not be inferred that a state's quota was never reduced. Had the ratio been so maintained that no state would ever have lost representatives, the House would now be two or three times as large as it is. From a maximum of twenty-three, Virginia's quota dwindled to nine in 1872; and plenty of other shrinkages could be cited, especially in New England and the South. Nevertheless, several reapportionments were carried through without the loss of a seat by any state; and the act of 1911, based on the census of the previous year, was considered a marvel of ingenuity in that it did not diminish the representation of a single state, while yet increasing the total membership by only forty-nine.

The limit of ingenuity seems, however, to have been reached in that statute; for when Congress was next confronted with the task of reapportionment, following the census of 1920, it could devise no plan that would not either reduce the representation of as many as eleven states or increase the size of the House.<sup>2</sup> Being unwilling to do either, it simply failed to act; and for ten years the country went along without any reapportionment at all. Dozens of bills were introduced, but until 1929 nothing resulted. Meanwhile, there were, of course, loud complaints—from people who on principle disliked to see such a palpable evasion of a constitutional

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Failure to  
reapportion  
on basis of  
1920 census

<sup>1</sup> In 1842.

<sup>2</sup> To prevent loss of representation by any state, it would have been necessary to add forty-eight seats, bringing the total to 483. One method of reducing the size of the House, apart from regular reapportionments, is always available, but extremely unlikely to be brought into play, i.e., enforcement of the clause of the Fourteenth Amendment penalizing any state which withholds the suffrage from any adult male citizens "except for participation in rebellion or other crime" (see p. 194 above). If this provision were carried out, the southern states alone would lose from thirty to forty seats.

duty, from people who were troubled about the constitutionality of laws enacted by a Congress not formed on strictly constitutional lines, and about national elections conducted under an archaic apportionment of presidential electors,<sup>1</sup> and especially from the states and cities that stood to gain by a reapportionment. Much was made of the fact that by 1928 the country's population had grown since the apportionment of 1911 by a total of thirteen and one-half millions—seven times the whole population of the thirteen states in 1790. The argument that all these people were unrepresented was decidedly specious. But there was no denying that states like Iowa, with a relatively stationary population, were considerably over-represented, and that states like Michigan and California, containing cities of phenomenally rapid growth, were even more seriously under-represented.

The new  
law on re-  
apportion-  
ment  
(1929)

As the time for the fifteenth census (1930) approached, pressure for action increased, and in the summer of 1929 Congress managed to pass a measure providing both for the coming enumeration and for a reapportionment—the latter not on the basis of the 1920 census (the time for that had passed), but on the figures of 1930, and at future decennial intervals as well. Under the terms of this long-awaited piece of legislation, the membership of the House remains fixed at 435. Following each census, the president transmits to Congress a document (prepared by the Department of Commerce) showing the newly ascertained population of each state and the number of representatives—the total for the country remaining unchanged—to which each state would be entitled, first, by the method of allotment “used in the last preceding apportionment,” second, by “the method of major fractions,” and third, by “the method of equal proportions;”<sup>2</sup> and if Congress fails to act during the session at which this information is presented, a reapportionment automatically comes into effect in the next Congress according to the method employed in the last previous reapportionment, and remains in effect until Congress finally acts or a new census supplies a new basis. Under these terms, a reappor-

<sup>1</sup> W. S. Myers, “An Unconstitutional President,” *No. Amer. Rev.*, CCXXVI, 385-389 (Oct., 1928).

<sup>2</sup> The alternative methods of computing state representation by “major fractions” and by “equal proportions” stirred much controversy, among statisticians and political scientists as well as in Congress, but are too mathematically technical to be described here. See Z. Chafee, “Congressional Reapportionment,” *Harvard Law Rev.*, XLII, 1015-1047 (June, 1929). The system of major fractions, as employed in 1911 and in 1931, is explained briefly in *U. S. Daily*, Aug. 2, 1930, pp. 1739 ff.

tionment based on the 1930 census was carried out in 1931, resulting in a gain of from one to nine seats by eleven states and a loss of from one to three by twenty-one. Congress is not deprived of opportunity to make such a reapportionment at the proper time as it may desire. But the automatic clause of the new law prevents the matter from simply going by default, as it did in 1920-29; and this is a distinct gain.<sup>1</sup>

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Beyond requiring a direct popular vote, the constitution does not say how representatives shall be chosen in the several states. On the contrary, it provides that the time, place, and manner of holding the elections shall be prescribed in each state by the legislature thereof, subject to a right of Congress to make or alter such regulations.<sup>2</sup> In the earlier days, Congress left the states to their own devices, and, naturally, wide differences of usage arose. Thus in some states the representatives were chosen from single-member districts; in others, on a general ticket, as are presidential electors to-day. In successive reapportionment acts, beginning with that of 1842, however, Congress enjoined that every state entitled to more than one representative should be divided by the legislature into districts composed of contiguous territory and equal in number to the state's quota of representatives, and that each district should be entitled to elect one representative. Further legislation authorizes a state receiving an increase in its quota to keep its districts intact and elect the additional representatives at large, if it desires to do so, or, indeed, in case of a decrease, to abandon its districts and elect the entire number at large; hence the congressmen-at-large of which one occasionally hears. In nearly all states, however, every representative is elected in a district.

General  
ticket and  
district  
systems

The district system was adopted in 1842 primarily in the interest of minorities.<sup>3</sup> If all the congressmen of a state were chosen on a general ticket, the total number would go to whatever party

Proposals  
for pro-  
portional  
representa-  
tion

<sup>1</sup> Starting at 33,000 at the reapportionment of 1792, the number of people for whom each representative sits rose to substantially 212,000 under the reapportionment of 1911 and 282,000 under that of 1931. These are far larger numbers than form an average parliamentary constituency in Great Britain, France, and other foreign countries. The constitution requires simply that the number of representatives shall not exceed one "for every 30,000."

<sup>2</sup> Art. I, § 4, cl. 1. In the case of *Newberry v. United States*, the Supreme Court held in 1921 that the constitutional authority of Congress to regulate elections does not include power to regulate nominations (256 U. S. 232). Critical summaries of this decision will be found in *Polit. Sci. Quar.*, XXXVI, 472-476 (Sept., 1921), and *Amer. Polit. Sci. Rev.*, XVI, 22-24 (Feb., 1922).

<sup>3</sup> The same change was made in 1885 in electing members of the British House of Commons, and for a similar reason. See F. A. Ogg, *English Government and Politics*, 244.

polled a plurality of the state-wide vote, however narrow the margin of victory might be. Under the district plan, however, a minority party will usually capture a few seats in localities where it is strongest. Of course this is only a very rough and uncertain method of securing minority representation; and one will not be surprised to learn that advocates of the device known as proportional representation urge a return to the general ticket plan, coupled with some method of apportioning seats in exact accordance with the distribution of the popular vote. Under such an arrangement, they say, it would not be possible—as happened in 1928—for 1,564,000 Democrats in eight southern states to send seventy-four representatives to Congress and 1,769,000 in twelve northern states to send none; or for 1,989,000 Democratic votes in New York to elect twenty-three congressmen and 2,072,000 Republican votes to elect only twenty.<sup>1</sup> Geographical districts are, at best, an artificial and arbitrary basis of representation; only where there is a fair degree of economic and social homogeneity, as, for example, in an extensive farming area, can the elected representative claim to speak for a genuine community opinion, except perhaps on an occasional issue. On the other hand, it may be argued that party divisions at the polls often fail to reflect any genuine division of interest or opinion; so that any allocation of seats in accordance with party labels will fall short of giving the truest sort of representation. In addition, it may be objected that proportional representation, by opening a way for minor groups to obtain seats, would make for a multi-party system and for the rule of *blocs* (already a problem in Congress), and that in the half-dozen American cities where the plan has been tried the results have not always been encouraging.<sup>2</sup> Congress could, of course, in some future reapportionment act, require the proportional system to be employed in every one of the states. A wiser course would, however, probably be merely to permit election at large or from multi-member districts in any state in which adequate provision was made for the proportional representation of all political groups. Under such authority, one or more progressive states might attempt a demonstration of how the scheme would work, thereby laying a basis for generalizing the plan if experience seemed to justify doing so.

<sup>1</sup> *Proportional Representation Review*, 3rd ser., No. 92, pp. 62-64 (Oct., 1929). See also table comparing the party complexion of Congress after the 1928 election with what it would have been under proportional representation.

<sup>2</sup> See p. 700 below.

In addition to practically disfranchising substantial minorities, the district system puts a premium on misuse of power by state legislatures for party advantage. After every census, all states whose quota of representatives has been changed must normally be redistricted; and, although national law requires the districts to be composed of "contiguous and compact territory containing as nearly as practicable an equal number of inhabitants," party majorities in the legislatures rarely resist the temptation, when laying out a new set of districts, to arrange boundary lines with a view to capturing the greatest number of congressmen at the ensuing elections. If the Republicans are in control, they will seek to mass the Democratic strength in a few districts, and to distribute their own strength in such a way as to yield small, but reasonably safe, pluralities in a large number of districts. It is both theoretically and practically possible thus to enable a minority of the voters, properly grouped, to return a majority of representatives for the whole state; and by the same token, a state's party quotas in Congress can be reversed by a carefully devised redistricting, practically, or even entirely, without change in the popular vote.

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Laying out  
the districts

This practice is no new thing in our political experience. On the contrary, the name by which it is known, *i.e.*, "the gerrymander," was invented as early as 1811,<sup>1</sup> and the device itself goes back much farther. Nor is it confined to the laying out of congressional districts. Notwithstanding much legislation against it, it is equally common in the division of states into legislative districts, and of cities into wards. It results in congressional districts with two and three times the population of other districts in the same state; also in districts of curious and indefensible shapes, *e.g.*, a former notorious "shoe string district" in Mississippi, extending almost the length of the state from north to south and constructed to minimize the effect of the negro vote, and the "saddlebag district" in Illinois, composed of two narrowly joined groups of counties on opposite sides of the state, and planned expressly to crowd as many Democratic counties as possible into a single district. The custom is a bad one, but it is very difficult to break up. Practically, the districts cannot be made absolutely equal; and it is not feasible to make them as compact as mere physical considera-

Gerrymandering

<sup>1</sup> The gerrymander takes its name from Governor Elbridge Gerry, of Massachusetts, who is reputed to have approved, if indeed he did not inspire, a notorious piece of partisan districting in his state.

tions would dictate; it is considered desirable, for example, not to divide counties or cities between two or more districts.<sup>1</sup> But with the legal requirement thus admittedly and properly adjustable to particular circumstances, evasions become difficult to prevent. The one hopeful thing that can be said is that public sentiment now condemns the gerrymander far more than it did during the hey-day of to-the-victors-belong-the-spoils politics, and it is to this awakened feeling that we must look for a sort of "gentleman's agreement," such as will restrain party majorities from taking the advantage that can always be wrung, if they are minded to do it, from legislation touching the distribution of representation.<sup>2</sup>

Congressional  
regulation of  
elections

Congress has gone farther, in regulating congressional elections, than merely to require uniform use of the district system. Taking advantage of the clause of the constitution which authorizes it to regulate the "time, place, and manner" of elections, it prescribed in 1872 that all congressmen shall be chosen by secret ballot,<sup>3</sup> and, in 1873, that congressional elections shall be held throughout the country on the same day, namely, the Tuesday following the first Monday in November of every second year.<sup>4</sup> Previously, voting was in some instances *viva voce*, and elections were held at widely varying dates. Candidates are nominated as the laws of the several states provide. In most cases, the direct primary is employed; but in several states the nominations are still made by district nominating conventions composed of delegates representing counties, towns, or other subdivisions.

Contested  
elections

Contrary to the English practice of referring contested parliamentary elections to a judicial settlement, our constitution makes the House of Representatives the judge of the "elections, returns, and qualifications" of its members.<sup>5</sup> Accordingly, every dispute involving a seat is decided by the House itself. If a candidate is unwilling to concede his defeat, he may ask for and obtain a local recount of the votes as provided for in the state election laws, and, further, he may carry his case to the House. According to national

<sup>1</sup> This is, however, sometimes done; and, of course, large cities, *e.g.*, New York and Chicago, are themselves divided—usually along ward lines—into districts.

<sup>2</sup> Maps showing the arrangement of congressional districts in each state, as existing in 1930, will be found in *Congressional Directory*, 71st Cong., 3rd Sess. (Dec., 1930), pp. 589-640. New districting was, of course, made necessary in many states by the national reapportionment following the 1930 census.

<sup>3</sup> This does not preclude the use of voting machines.

<sup>4</sup> By exception, Maine holds its election in September.

<sup>5</sup> Art. I, § 5, cl. 1.

law, he must, in the latter event, serve notice on the candidate who has been reported elected, giving the grounds on which his contest is to be based; and the person so notified must make a formal reply. The papers are then transmitted to the clerk of the House, who puts the case in shape, reports it, and procures a reference of it to one of three standing committees on elections which the House maintains for the purpose. The committee weighs the evidence, hears the claimants, takes other testimony if desired, and prepares a report in favor of one candidate or the other, which the House usually accepts. Party considerations are likely to have much to do with the decision, and the English plan of turning over such cases to a non-partisan and disinterested board of judges is decidedly better. But, fortunately, contests are not numerous.<sup>1</sup>

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The term of members is two years, which is, therefore, the period of "a Congress." When the constitution was framed, it was the fashion to argue that "where annual elections end, tyranny begins;" and the authors of *The Federalist* found it necessary to devote one of their papers to a defense of the two-year term.<sup>2</sup> Nowadays, it is widely felt that the term is not too long, but too short. The average person elected to the House for the first time has no acquaintance with the assembly's methods of doing business, has had no legislative experience (except possibly in a state legislature or a city council), and has only a superficial knowledge of the public affairs with which Congress is called upon to deal. Elected for only two years, he cannot progress far toward becoming a useful member, much less a leader, before his term expires. Many congressmen, to be sure, are reelected at least once or twice, and are thus enabled to accumulate considerable knowledge and experience. Indeed, a computation in 1929, based on the then existing Seventy-first Congress, showed that the average period of service of all members of the House at that time was 8.45 years. The figure was as high as this, however, only because of the exceptionally long stretches of service of certain members—thirty-five years, in one case—and the fact remains, not only that many members serve for only one or two terms, but that from one-fourth to one-half of the names on the roll of every newly-elected House

Term and  
"turnover"

<sup>1</sup> There were four in the Sixty-ninth Congress, four in the Seventieth, and five (including one turning on a question of eligibility) in the Seventy-first.

<sup>2</sup> No. LIII (Lodge's ed., 333-339). Under the original Revolutionary state constitutions, the members of the state legislatures were elected annually in every state except South Carolina, and there biennially.



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Excessive  
interval  
between  
election  
and meet-  
ing of a  
Congress

were never there before.<sup>1</sup> Furthermore, a member cannot get far into a two-year term without being obliged to turn his thoughts to reelection. This distracts his attention and divides his energy.

But worse still is the arrangement under which members of a given Congress do not, as a rule, actually enter upon their duties until thirteen months after being elected. Members are chosen, as we have seen, in early November. Their term begins on March 4, following. But unless the new Congress is called in special session during the ensuing spring or summer, it does not meet until time for the first regular session to begin, namely, the first Monday in December. By that date, the term of the members has almost half expired; the next congressional elections are only eleven months distant; and the campaign for renomination is even nearer at hand. Meanwhile, with the new Congress elected and waiting to go to work, the old Congress sits through its allotted "short session"—from December to March—passing necessary appropriation bills, but otherwise, as a rule, merely marking time, frequently to the accompaniment of lively filibustering in both houses. The new Congress may have been captured by a different party and the old one practically repudiated by the country; in any case, the latter is besprinkled with "lame ducks," i.e., members who have failed to be reelected. But it goes on with the second of its required sessions just the same. Vastly better it would be for a new Congress, armed with a fresh mandate from the people, to begin work a few weeks after being elected, as is the practice of parliaments in foreign countries without exception. A new president, too, might advantageously take office sooner than he now does.

Proposed  
constitu-  
tional  
amendment

The problem of the "lame duck" session has of late come in for a good deal of attention. Senator Norris, of Nebraska, has repeatedly introduced a resolution proposing that the constitution be amended to provide that congressional terms begin, and regular sessions open, on the first Wednesday in January following the congressional elections, and that the president and vice-president be inaugurated two weeks later. This would mean an interval of only two months between the election of a new Congress and its

<sup>1</sup> The actual "turnover" has varied from 20.3 per cent in the Sixty-ninth Congress to 71.9 per cent in the Twenty-eighth. The average from 1790 to 1924 was 44 per cent. There has been a tendency for the peaks of the turnover to be associated with periods of depression. See R. and M. Fletcher, "The Labor Turnover of the United States Congress," *Social Forces*, VII, 129-132 (Sept., 1928).

first meeting; and since it would also do away with short sessions, it would undoubtedly be a great improvement.<sup>1</sup> On five different occasions since early in 1923, the Senate has given the resolution the two-thirds majority necessary to put an amendment before the states—the last time (in 1929) by a vote of 66 to 9. Until 1928, the House manifested little interest in the matter. In that year, it endorsed the resolution by a vote of 209 to 157—a majority, but not the requisite two-thirds. In February, 1931, it returned to the subject and passed, by the very substantial vote of 239 to 93, not the Norris resolution as approved by the Senate, but an alternative resolution<sup>2</sup> providing (1) that the terms of members of a newly elected Congress should begin on January 4, and that the new Congress should meet on that day; (2) that a newly elected president and vice-president should be inaugurated on January 24; and (3) that the second regular session of Congress should end on May 4. A conference committee of the two houses was duly appointed, but could not reach an agreement; and in the closing days of the session the project was abandoned. Agreement failed because the Senate members of the committee were totally unable to accept the House proposal, originating with Speaker Longworth, that under the new plan, as under the old, the second regular session of a Congress should be limited to a definite period, *i. e.*, should be a "short session." The subject, however, will be kept alive, and it is safe to assume that one of these days the states will be given an opportunity to vote on the long-needed reform. The outcome can hardly fail to be favorable.<sup>3</sup>

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<sup>1</sup> Under this plan, by way of illustration, the Seventy-second Congress, elected in November, 1930, would have met in January, 1931; its first session would run up to any desired date prior to January, 1932; its second regular session would start in January, 1932, and extend to any desired date up to January, 1933, though likely to terminate somewhat before the election of the next Congress in November, 1932. An old Congress would rarely, if ever, sit after a new one was elected. Another effect would be to reduce the need for special sessions, and therefore the president's existing vast discretion in convening or not convening them.

<sup>2</sup> Known as the Gifford resolution, because introduced by a Massachusetts member of that name who was chairman of the House committee on elections.

<sup>3</sup> It will be noted that Congress itself has power to appoint a different day from the first Monday in December for the opening of its regular annual sessions (Art. I, § 4, cl. 2). But it could not alter the present date, March 4, of beginning of presidential and congressional terms of office without shortening or lengthening the constitutionally fixed terms of at least one president and the members of one Congress. This it would have no power to do; hence the necessity of a constitutional amendment. See M. A. Mussman, "Changing the Date for Congressional Sessions and Inauguration," *Amer. Polit. Sci. Rev.*, XVIII, 108-118 (Feb., 1924); "Should the Time of Inauguration and Meetings of Congress be Changed?," *Cong. Digest*, Aug.-Sept., 1926; and "The Norris Resolution," *Const. Rev.*, XIII, 171-180 (July, 1929).

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XXQualifica-  
tions of  
members

Four qualifications, including one of a negative nature, are required of a representative by the constitution. He<sup>1</sup> must be twenty-five years of age, or over; he must have been a citizen at least seven years; he must be, at the time of his election, a legal resident for voting purposes (not merely an inhabitant) of the state in which he is chosen;<sup>2</sup> and he cannot hold, while a member of the House, any "office under the United States."<sup>3</sup> The last-mentioned restriction is construed to debar army and navy officers, as well as holders of civil office; and it is hardly necessary to point out that, in disqualifying heads of executive departments, it is directly contrary to the unwritten rule in England which requires every minister to have a seat in Parliament.<sup>4</sup>

Custom  
concerning  
residence

To these qualifications, custom has added one other, namely, residence in the district represented. Here we come upon another important difference between American and European political usage. In England, for example, members of the House of Commons often sit for constituencies, or districts, other than those in which they live. A man aspiring to enter Parliament, but finding no opportunity in his own district, "stands" in some other district, wherever there is an opening and the party authorities will accept him as a candidate; or a member, defeated in the district which he has represented, turns to another, and perhaps is thus enabled to remain in public life. Many prominent British statesmen have represented two, three, or even more, different constituencies, without change of residence, during their parliamentary careers.

Unfortunate  
effects

There is nothing in the national constitution or laws to prevent a person from doing the same thing in the United States, save that he cannot, of course, become a candidate in any district outside the state in which he lives; and there have actually been a few non-resident representatives, mainly congressmen living in the same city in which their districts were situated, but in a different portion of the city, *e.g.*, an uptown representative of a downtown New York district. In general, however, it is assumed that a representative will be a resident of his district, and it is rarely worth while for an outsider to seek election. Local pride forbids taking a congressman from a different section of the state; only an actual

<sup>1</sup> Women are eligible on the same terms as men, and several have been elected.

<sup>2</sup> Art. I, § 2, cl. 1. *Cf.* the case of James M. Beck in the Seventieth Congress.

<sup>3</sup> Art. I, § 6, cl. 2. A state office does not disqualify for membership.

<sup>4</sup> Officers under the crown, other than ministers, are, however, debarred from the House of Commons.

resident, it is felt, will be duly diligent in securing appointments, public buildings, and other favors for the district; only a man whose personal and business interests are bound up with the district can be trusted to stand for what its people want on taxation, tariff, immigration regulation, and other public questions—if, indeed, even such a one can be trusted to meet so multifarious a test. The case for the home congressman seems to the average citizen absolutely conclusive.<sup>1</sup> Nevertheless, it ignores the intent of the constitution that congressmen shall represent the people generally, and not simply their own constituents; and the requirement works positive harm by cutting off opportunity for good men, living in districts dominated by a different party from their own, to seek a congressional career, by giving an experienced and useful congressman who meets defeat in his district no chance to be returned by another constituency;<sup>2</sup> and, perhaps above all, by helping to keep alive the pernicious concept of the congressman as the district's official agent for procuring appointments, buildings, and other benefits.

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Several times the question has arisen whether other qualifications than those stipulated in the constitution can be imposed. Legally, they cannot be; practically, they can be. Usage may establish them, as in the case of residence. And the House may make additions, as it did in 1900, when it refused to seat Brigham H. Roberts of Utah on the ground that he was a polygamist, and again in 1919, when Victor L. Berger of Wisconsin was excluded because of having been judicially convicted of sedition and disloyalty. These decisions were of doubtful constitutionality. The proper procedure would seem to be to seat an objectionable person and then expel him. But the actions taken in the cases mentioned stand on the record as evidence that, regardless of the theory of the matter, the House, in exercising its constitutional right to judge the qualifications of its members, can impose a test for admission of which the constitution makes no mention.<sup>3</sup>

Can other  
qualifica-  
tions be  
required?

<sup>1</sup> See Lord Bryce's statement of it and comments on it, *American Commonwealth* (4th ed.), I, 191-195, and *Modern Democracies*, II, 53-55. Cf. H. W. Horwill, *The Usages of the American Constitution*, Chap. ix.

<sup>2</sup> "A strong man in English politics need never be without a seat in parliament, but the ablest statesman in the United States has practically no chance of a seat in Congress if his own home district should contain a majority of voters who belong to the opposite political party." W. B. Munro, *Government of the United States* (rev. ed.), 223.

<sup>3</sup> Practically all constitutional lawyers agree that no state may add qualifications to those fixed by the constitution (Cf. A. S. Hinds, *Precedents of the House of Representatives*, I, § 415). Nevertheless, some states have sought to

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The Senate

The form originally given the second branch of Congress was, as we have seen, an outcome of compromise. To offset the heavy preponderance of the large states in the House of Representatives, small states were guaranteed equal representation with large ones in the Senate; and to provide a counterweight to direct popular control in the former body, it was arranged that senators, like the president, should be elected indirectly and at longer intervals. Accordingly, the constitution as adopted provided that the Senate should consist of two members from each state, chosen by the legislature thereof for a term of six years.

Federal  
basis

The extremest demands of the small-state party were not met. Instead of being paid by the states, as was urged, senators are paid out of the national treasury, as are representatives. More important than this, instead of voting by states, as was advocated, they vote as individuals; all states have, indeed, the same number of votes, but the two votes of any given state are cast independently, and frequently are recorded on opposite sides of a question. The Senate is, therefore, constructed on the federal principle, yet is not as completely federal as it might have been made; it is federal in respect to membership, but not in respect to compensation and voting.

Criticism  
of state  
equality in  
the Senate

The equality of the states in the Senate required a good deal of defense from the constitution's makers, and in later times it has often been regarded as an unfortunate, if not utterly unjustifiable, arrangement. It is pointed out that, contrary to earlier expectation, there has never been an alignment of states on the basis of size; that cleavages run on other lines, *e.g.*, agricultural as against industrial and commercial states; and that, therefore, the precaution of the framers in the interest of the small states has turned out to be unnecessary.<sup>1</sup> Meanwhile, the disparity of state populations has reached enormous proportions, and the incongruities of the system, viewed merely as a matter of arithmetic, have become a source of amazement. New York, with more than twelve and one-half million people, has two senators; Nevada, with ninety-one thousand has also two senators. On a proportional basis, New York would have two hundred seventy-seven senators! Pennsylvania has a million and a half more people than all New England; but New

require that members shall be residents of the districts they represent, and no clear way appears of setting aside these regulations by legal process.

<sup>1</sup> Alexander Hamilton believed that there would be no contests between large and small states as such (see Elliot's *Debates*, II, 213), but most of his contemporaries thought otherwise.

England has twelve senators and Pennsylvania two. The six states of New York, Pennsylvania, Illinois, Ohio, Texas, and California have forty-eight million inhabitants, or nearly forty per cent of the total population of the continental United States. Yet, in a Senate of ninety-six members, they have only twelve, *i.e.*, about twelve per cent.

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More significant than this mere disproportion of numbers is the resulting disproportion in the representation of major economic and social interests. Industry and commerce predominate in only a few states, agriculture predominates in many; hence, rural and agricultural interests are heavily over-represented, industry and commerce decidedly under-represented. As a recent writer has reminded us, it is no accident that the stronghold of the so-called "farm bloc" is not the House, but the Senate.<sup>1</sup> He might have added that it is no accident that the president has so much trouble with treaties, seeing that the body which must assent to the ratification of them is predominantly representative of inland rural populations tending to a provincial and local outlook.

People who have been troubled by the situation described—either merely because of the numerical disparities involved or because of the inequitable representation of interests—have suggested various remedies, chiefly that a state be allowed an additional senator for every million inhabitants in excess of some fixed number. This would not result in an exact proportioning such as is presumed to apply in the House of Representatives, but would appreciably lessen existing inequalities; and at first glance the proposal seems reasonable. If carried out, it would have the undoubted advantage of introducing a fairer balance between rural and urban, agricultural and industrial, interests. There are, however, several things to be said before conclusions are reached. In the first place—quite apart from the merits of the question—there is the almost insuperable difficulty of bringing about any change that would impair the equal suffrage of the states in the Senate. Not only would a constitutional amendment be necessary, but, under the provisions of Article V, the express consent of every state whose representation would become less than that of some other state would have to be obtained.<sup>2</sup> Recalling how difficult it has been to bring about a simple reapportionment of seats in the

Proposed  
changes

<sup>1</sup> H. L. McBain, *The Living Constitution*, 222.

<sup>2</sup> Unless the pledge given the small states should simply be broken, which would be possible enough, but is practically certain never to happen.

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Why not  
desirable

lower house if involving a diminution in the delegations of some states, one is warranted in concluding that such consent could probably never be secured.

Even, however, if this hurdle could be surmounted, there would still be valid objections to the plan. To begin with, the number of senators would be greatly increased, and such efficiency as the Senate now shows as a deliberating and revising body would be seriously impaired. The House of Representatives is much too large for effective work except through committees. It would be unfortunate if the Senate were to find itself in the same situation. In the second place, the change would upset the fundamental balance which representation in Congress now involves. Criticism of the present arrangement commonly springs from the idea that representation, to be worthy of the name, must be based on and proportioned to numbers; whereas there is no essential reason why a senator may not quite as satisfactorily represent five million people as five hundred thousand, just as the president sometimes better represents the people of the entire nation than do several hundred locally elected congressmen.

Opinion of  
Woodrow  
Wilson

A leading virtue of the Senate is, indeed, that it does not represent mere numbers. "What gives the Senate its real character and significance as an organ of constitutional government," says Woodrow Wilson, "is the fact that it does not represent population, but regions of the country, the political units [*i.e.*, states] in which it has, by our singular constitutional process, been cut up. The Senate, therefore, represents the variety of the nation as the House does not. It does not draw its membership chiefly from those parts of the country where the population is most dense, but draws it in equal parts from every state and section . . . regions must be represented, irrespective of population, in a country physically as various as ours and therefore certain to exhibit a very great variety of social and economic and even political conditions. It is of the utmost importance that its parts as well as its people should be represented; and there can be no doubt in the mind of any one who really sees the Senate of the United States as it is that it represents the country, as distinct from the accumulated populations of the country, much more fully and much more truly than the House of Representatives does. . . . The House of Representatives tends more and more, with the concentration of population in certain regions, to represent particular interests and points of view, to be less catholic and more and more specialized in its view of

national affairs. It represents chiefly the East and North. The Senate is its indispensable offset, and speaks always in its make-up of the size, the variety, the heterogeneity, the range and breadth of the country, which no community or group of communities can adequately represent."<sup>1</sup>

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It is an axiom of politics that in a bicameral legislature the two houses ought not to be mere duplicates of one another, but ought to be able to approach public questions with different backgrounds and from different points of view. Especially, as the high authority quoted suggests, is this desirable in a nation of the size and heterogeneity of the United States. Representation in one house on the basis of numbers and in the other on the basis of states is the best guarantee of this balancing of interests that has been devised in federally organized nations. The more desirable is the arrangement, too, in a system in which—as is now true of ours—the members of both houses draw their mandates directly from the same source. If senators and representatives are to be elected by the same people, and also to be apportioned in both instances to numbers of people, it is questionable whether it is worth while to have two houses at all.

Desirability  
that the  
two houses  
be consti-  
tuted dif-  
ferently

Five or six different ways of choosing senators were considered by the constitution's framers. Direct popular election looked too democratic. Appointment by the president, with or without nomination from the states, was objected to as being inconsistent with the separation of powers. Election by the House of Representatives, from persons nominated by the state legislatures, was better thought of, but finally won the votes of only three state delegations. Selection by colleges of electors, popularly chosen in the several states for this sole purpose, was favored only by Hamilton and a few others. In the end, election by the state legislatures was hit upon as the least objectionable plan, and was adopted, with the proviso that a vacancy arising in any state, by resignation or otherwise, when the legislature was not in session should be filled by temporary appointment by the governor.<sup>2</sup> Certain distinct advantages were, indeed, expected to flow from this method of selection. Members of legislatures, it was thought, would be most likely to know the qualifications of senatorial candidates, and, being themselves men of substance and responsibility, would choose persons of superior character, and especially of conservative temper.

Original  
mode of  
election

<sup>1</sup> *Constitutional Government in the United States*, 114-117.

<sup>2</sup> Art. I, § 3, cl. 2.



Elected by the legislature, the senator would feel himself the representative, not of a faction or group or section, but of the entire state. The national and state governments would be dovetailed in a useful way, and people who feared that the strengthening of the former would mean the eventual extinction of the latter would find less ground for apprehension. "An important wheel in the national machine was geared directly to the mechanism of state government so that the state legislature could never be eliminated without bringing down one branch of Congress as well."<sup>1</sup>

Election by  
legislatures  
becomes ob-  
jectionable

These considerations were plausible, and in the testing period of the republic had undeniable weight. Later on, they seemed less important; and as the popular basis of government broadened—in the nation through the transformation of the presidential electoral college into an agency for merely registering the popular will, and in the states through the widening of the suffrage and the increase of elective offices—the conviction grew that senators, like representatives, ought to be chosen by the people directly. Proposals to this end were heard as early as 1826, and after the Civil War—more particularly after about 1885—the matter became one of the principal themes of public discussion. In addition to the general consideration that the prevailing system was undemocratic, it was objected to on a number of specific grounds. In the first place, it enabled men to be sent to the Senate who were not worthy of membership in that body, or at all events were inferior to others who might have been elected. The candidate who could bring the most influence to bear on the members of a legislature, or perhaps on a few who held the balance between party or other groups, was likely to win; and this influence took various questionable forms, not always stopping short of sheer bribery. Time and again, elections were controlled by political bosses, or by corporations which found this an easy way of influencing legislation at Washington. A second main difficulty was the effect on the legislatures themselves. Party spirit, keyed to a lofty pitch during a senatorial contest, failed to subside when the legislature turned to its regular tasks. Electoral deadlocks were of frequent occurrence, because of the inability of any candidate to attain the requisite majority, and the main business of the legislature was delayed and otherwise interfered with; besides, on account of failure to elect, a state sometimes had only one member in the Senate for a

<sup>1</sup> W. B. Munro, *Government of the United States* (1st ed.), 148. See G. H. Haynes, *The Election of Senators*, Chap. I.

year or two, or even longer.<sup>1</sup> Even in the election of the legislature by the people of the state, harmful effects appeared; for the contest often turned on the attitude of candidates toward certain senatorial aspirants, rather than on the needs and interests of the state itself.

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In 1893, the House of Representatives passed, by the requisite two-thirds vote, a resolution submitting a constitutional amendment providing for direct popular election. The proposal failed in the Senate, and in the next ten years four or five like attempts came to the same end. In 1892, and again in 1896, the Populist party declared for the change; in 1900 and successive presidential years thereafter, the Democrats put a similar plank in their platform; in his speech of acceptance in 1908, Mr. Taft asserted his personal approval of the proposal, although the subject was not mentioned in his party's platform. More than two-thirds of the state legislatures themselves passed favorable resolutions.<sup>2</sup>

Movement  
for direct  
popular  
election

Meanwhile, a number of states worked out a plan under which popular election was secured, to all intents and purposes, regardless of the fate of the proposed amendment. The means employed was the direct primary. By a state law, the voters of each party were authorized to indicate at the polls which of the party candidates for a senatorship they preferred, and the nominations thus made were formally reported to the legislature. Usually that body was trusted, without any special precaution, to carry out the public will by electing the designated candidate of the majority party. Oregon and Nebraska, however, introduced a system under which candidates for the legislature were asked to pledge their support in advance to the "people's choice," irrespective of party. In either case, there was no obligation other than moral; legally, the legislature remained free to elect whomsoever it would. But the popular will was almost invariably carried out; indeed, in 1908 a Democratic senator was elected in Oregon by a Republican legislature. By 1912, senators were nominated popularly in a total of twenty-nine states, scattered throughout the country, and election by the legislatures was fast coming to be quite as much a fiction as is the choice of the president by the electoral college.

Rise of  
nomination  
by direct  
primary

<sup>1</sup> Two famous deadlocks of this kind were that in Pennsylvania when, in 1899, a successor to Senator Quay was to be elected, and that in Delaware, where Mr. J. E. Addicks kept up a running fight for a senatorship from 1895 to 1903. An act of Congress in 1866 regulated various aspects of the electoral procedure, but did not, and could not, reach the main difficulties.

<sup>2</sup> The movement is described at length in G. H. Haynes, *op. cit.*, Chaps. v-x, with accompanying bibliography.

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XXPopular  
election  
under the  
Seventeenth  
AmendmentEffects of  
the new  
system

Under these conditions, the opposition in the Senate weakened. Many of the members recognized that they were, in effect, already elected by the people; and in 1912 the Seventeenth Amendment was got through both houses of Congress, and in 1913 proclaimed in force. Under the new arrangement, senators are chosen directly by the people of the several states; and, as is the case in the election of members of the House of Representatives, the electors include all persons who are qualified to vote for members of the "most numerous branch of the the state legislature." If a vacancy arises, the governor of the state issues writs of election to fill it for the remainder of the unexpired term. The legislature may, however, empower him to make temporary appointments; and most legislatures have taken this action.

The effects of the change to direct popular election cannot as yet be measured completely. Relief of the state legislatures from the burdens and distractions formerly entailed by senatorial elections has, of course, resulted automatically; these bodies now have a far better chance than before to center their attention on other, and major, state affairs. Of this great gain, there can be no doubt. The effect on the Senate itself is less clear; more time will be needed to reveal it. Certainly the amendment produced no abrupt shift of personnel. Practically every senator who could have expected to be continued in office at the hands of his state's legislature was continued on the popular basis. Furthermore, abuses arising from the lavish use of money in senatorial nominations and elections have not disappeared, as is evidenced by the Newberry controversy of 1918-22, the cases of William S. Vare of Pennsylvania and Frank L. Smith of Illinois in 1926-28, and other somewhat less noted instances.<sup>1</sup> Money is employed in a different way, because it is now the state-wide electorate that has to be reached; but, speaking broadly, senatorial politics remains a rich man's

<sup>1</sup> By a close vote, the Senate decided, January 12, 1922, not to unseat Truman H. Newberry, senator from Michigan, for spending \$195,000 in his primary, or nomination, campaign. A resolution of censure, however, declared such expenditure excessive, contrary to sound policy, and dangerous to the perpetuity of free government; and Mr. Newberry subsequently resigned (see p. 222, note 2, above). By votes of 53 to 28 and 56 to 30, on December 7 and 9, 1927, the Senate refused to seat Vare and Smith, respectively, on charges of improper receipt and use of large sums of money in securing nomination and election. Prolonged subsequent investigations and controversies failed to bring a reversal of the decisions. The final vote in the Vare case, on December 6, 1929, was 58 to 22. Campaign expenditures of Senator Joseph R. Grundy of Pennsylvania, and of Mrs. Ruth Hanna McCormick of Illinois, stirred much comment in 1930, and in the latter case were subjected to an official investigation.

game, and senatorships may still, in effect, be bought.<sup>1</sup> Certain undesirables, *e.g.*, the virtual appointees of avaricious capitalistic interests, are now pretty well excluded; but others, *e.g.*, the demagogue, and especially the shrewd manipulator of federal patronage, have perhaps a better opportunity than before. Popular election is of itself no guarantee of fitness; and whether, after the now fast disappearing generation of members that first entered the upper house by legislative election is entirely gone, the body will show a higher level of ability, integrity, and achievement than in the days of Webster, Clay, and Calhoun, or of Allison, Spooner, and Hoar, remains to be determined. The prospect that it will do so is not, it must be admitted, very flattering.

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The term of senators is six years. Some of the framers of the constitution favored a longer period; indeed, a few advocated election for life. But to most persons six years seemed sufficiently long to ensure the desired stability and continuity. The rule puts the senator in a very different position from the representative. Unlike the latter, he has time in a single term to acquire experience, and even to attain a certain degree of leadership; and he can devote himself single-mindedly for several years to public affairs with only incidental thought of reelection. Most senators, furthermore, have more than one term, and periods of service running to eighteen, or even twenty-four, years are not uncommon.<sup>2</sup> Continuity of personnel produced by long terms and numerous reelections is further secured by the mode of renewing the membership. The original senators were divided into three classes, with terms expiring in two, four, and six years respectively; and thus an arrangement was instituted under which the terms of one-third of the members expire every two years.<sup>3</sup> The Senate, therefore, never finds itself in the position in which the House of Representatives is found every two years—a new body, with greatly altered membership, obliged to organize from the ground up. On

Term and  
continuity  
of service

<sup>1</sup> A "rider" tacked on a postal salary increase act of 1925, and designated as the "Federal Corrupt Practices Act, 1925," fixed \$25,000 as the maximum sum that a senatorial candidate in any state may lawfully spend in his campaign for election (see p. 223 above). No attempt was made in the act to regulate expenditure incurred in seeking nomination.

<sup>2</sup> The average turnover in the Senate from 1790 to 1924 was 27.2 per cent. In the Fifty-first Congress, it fell to the low figure of 10 per cent. The average turnover in the House between 1790 and 1924 was 44 per cent. See p. 414, note 1, above.

<sup>3</sup> In no case were both senators of a state placed in the same class, and the senators of states admitted later were always assigned, by lot, to different classes. Hence, barring vacancies arising from death or resignation, only one senator is elected in a state in any given year.

the contrary, it is continuous: considerably more than two-thirds of its members at any given time have served at least as long as two years; leadership develops slowly and changes seldom; precedents and traditions are carried along on the current of a never-ending stream. It was in the longer term of service and the greater continuity, no less than in its superior powers, that Lord Bryce found the reason for the superiority which the Senate early acquired and has long enjoyed over the lower house.<sup>1</sup>

Senators must be at least thirty years of age, and must have been citizens of the United States at least nine years. Otherwise, their constitutional qualifications are identical with those of representatives: they must be inhabitants of the states that elect them, and during their tenure they may not hold any office under the United States. Like representatives, too, they may not at any time be appointed to a civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during the time for which they were elected. Equally with the House, the Senate is endowed with the right to judge the elections, returns, and qualifications of its members;<sup>2</sup> and here also the question has arisen whether qualifications can be imposed in excess of those prescribed by the constitution. We have seen that the House has refused to seat a member-elect because he was a polygamist.<sup>3</sup> Asked to seat a senator-elect who, although not a polygamist, was accused of being an adherent of the Mormon Church, the upper house took what seems to be the better constitutional ground, namely, that any person duly elected, and having the qualifications required by the constitution, must be received, although he may subsequently be expelled.<sup>4</sup> Expulsion may be for any cause. But it is to be noted that neither senators nor representatives are regarded as civil officers of the United

<sup>1</sup> *Modern Democracies*, II, 59. Cf. pp. 484-486 below.

<sup>2</sup> Contested elections are investigated and reported upon by the standing committee on privileges and elections. An investigation sometimes extends over a period of two or three years, *e.g.*, in the Mayfield-Peddy case of 1922-25.

<sup>3</sup> See p. 417 above.

<sup>4</sup> In the case alluded to, which was that of Senator Smoot, a resolution for expulsion failed. Members can be expelled from either house by a two-thirds vote. More than a score, in all, have been expelled, most of them on charges of disloyalty growing out of the Civil War. In the Vare and Smith cases mentioned above, the argument was naturally made that the Senate should seat the two men, after which, if desired, they might be expelled. The decision to refuse to seat them was somewhat out of line with the precedents, although it was defended on the ground that their election had been irregular, in the sense of involving improper receipt and use of funds.

States, in the meaning of the constitution, and that accordingly they are not subject to impeachment.

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Members of both houses have certain constitutional privileges and immunities. In the first place, they are entitled to compensation, at a rate fixed by law, and paid out of the national treasury. Until 1855, they were given only a small per diem allowance, but at that time a salary of \$3,000 a year was authorized, which was increased in 1865 to \$5,000, in 1907 to \$7,500,<sup>1</sup> and in 1925 to \$10,000 (in the case of the speaker of the House of Representatives, \$15,000).<sup>2</sup> Members of the two houses have always been paid at the same rate. In addition to their salaries, they receive liberal allowances for travel, clerk hire, and stationery; and the frank, *i.e.*, the privilege of sending free through the mails any amount of matter stamped with their name, is tantamount to a substantial subsidy, especially in the numerous cases in which the right is abused by the distribution, at public expense, of tons of documents consisting mainly or wholly of speeches nominally prepared for delivery on the floor of Congress, although not necessarily actually delivered, and designed, in any event, for campaign uses.

Compensation of members of the two houses

Other provisions of the constitution and laws, based on hard-won English usages, are designed to prevent interference with the member's freedom of attendance, speaking, and voting. A senator or representative may be arrested at any time for treason, felony, or breach of the peace—which, as construed, means all indictable offenses;<sup>3</sup> so that he has really no exemption from the processes of the criminal law. But while attending a session, or going to or returning from a session, he cannot be arrested on civil process or compelled to testify in a court or serve on a jury.<sup>4</sup> Moreover, “for any speech or debate in either house,” he cannot “be questioned in any other place.”<sup>5</sup> That is, he cannot be proceeded against, outside of the house to which he belongs, because of anything he may have said in the course of debate, committee hearings, or other pro-

Privileges of members

<sup>1</sup> This figure was first reached in 1873, but public disapproval caused a reversion to the former amount within a year.

<sup>2</sup> On the general subject, see R. Luce, *Legislative Assemblies*, 535-545.

<sup>3</sup> *Williamson v. United States*, 207 U. S. 425 (1907).

<sup>4</sup> In 1929, Senators Coleman L. Blease and J. Thomas Heflin, having made charges relating to liquor and crime scandals in the national capital, were subpoenaed to appear before the District of Columbia grand jury. They refused to comply, and the District supreme court held that they were within their rights, since they could not be compelled to appear except by being placed under arrest, and could not be arrested while Congress was in session except for treason, felony, or breach of the peace. <sup>5</sup> Art. I, § 6, cl. 1.

ceedings properly belonging to the business of the house. He cannot, for example, be sued for libel or slander by a person whom he may have criticized. The privilege is sometimes used as a shield for unwarranted personalities, but it is fundamentally justifiable. If a member knew that he might be proceeded against at law by any person taking offense at his remarks in the exercise of his duties, he would speak and act, in view of the general publicity of congressional proceedings which now prevails, under an altogether undesirable sense of restraint.

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## CHAPTER XXI

### THE ORGANIZATION OF HOUSE AND SENATE

Under terms of the constitution, Congress meets at least once a year—on the first Monday in December, unless it should choose to fix a different date. This gives each Congress two regular sessions. In addition, there may be, and from time to time are, special sessions, called by the president “on extraordinary occasions,” although, unlike the governors of many states, he cannot limit the deliberations at such sessions to the subject or subjects specified in the call. Either house may be brought together in this way without the other, and the Senate is now and then convoked separately to act upon executive appointments or treaties—matters with which the House of Representatives, as such, has nothing directly to do.<sup>1</sup>

Congresses have been numbered consecutively since the first one met in 1789; and it is customary to refer to the sessions of each Congress as the first or second session, as the case may be. When, however, a newly-elected Congress has met in special session before the first Monday in the second December following its election, the sessions are numbered first, second, and third, beginning with the special session. Only once in the country's history has a Congress been called into special session a second time, thus giving it four sessions in all. This was in November, 1922, when President Harding convoked the Sixty-seventh Congress—which already had held a protracted special session in 1921—for consideration of a ship subsidy bill. The first regular session, which begins in December of the odd-numbered year following election, is called the “long” session, and usually lasts well into the following summer. The second regular session, opening in December of the ensuing even-numbered year, is called the “short” session, since its duration is limited by the fact that the term of its members will expire

<sup>1</sup> A special session of a single house is not, of course, a special session of Congress. For a list of special sessions of the Senate from 1791 to 1929, see *Congressional Directory*, 71st Cong., 2nd Sess. (Jan., 1930), 244. The most recent session of the kind was held in the summer of 1930 to act on the London Naval Treaty.



at noon on the fourth day of March following.<sup>1</sup> Unlike certain European parliaments, Congress is not obliged to remain in session any stated length of time. Unlike these parliaments, too, neither branch can be dissolved, or have its sessions suspended or prorogued by the executive. Neither house may adjourn without the consent of the other for a period longer than three days, or to any other place than that in which the houses are at the time sitting. Otherwise, the matter of adjournment is left to arrangement between the houses themselves, save only that when they disagree as to the time of adjournment, the president may intervene and adjourn them to "such time as he shall think proper."<sup>2</sup>

Organiza-  
tion of  
the House  
of Repre-  
sentatives

The roll

A newly chosen House of Representatives, meeting at noon on the first Monday in December, is called to order by the clerk of the preceding House; and this officer continues to preside until the House has elected its regular presiding officer, the speaker, although there is nothing to prevent the members-elect from choosing some other person to act as their temporary chairman if they like. After bringing the House to order, the clerk proceeds to call the roll of members by states alphabetically. Upon this roll are to be found the names of all members-elect whose certificates of election have been forwarded to the clerk of the House by the proper officials in the various states. If the right to a seat is claimed by some person other than the one holding such a certificate, the matter is referred for investigation and report, after the House has fully organized, to one of the three standing committees on elections.<sup>3</sup> In the meantime, the person named in the official certificate of election is presumed to have been legally elected, and he participates both in the organization of the House and in its regular legislative work after organization, until such time as it is decided that he is not entitled to a seat.<sup>4</sup> As the roll-call proceeds, a member-elect may object to the admission of some other member-elect on the ground that for some stated reason he is disqualified for membership. Upon completion of the roll-call, the oath of office

<sup>1</sup> Apart from special sessions, a Congress is in session, as a rule, about half of the time. The longest single session on record was the second session of the Sixty-fifth Congress, which extended from December 3, 1917, to November 21, 1918. The growing volume of business, added to various procedural impediments, keeps most of the world's parliaments in session eight or nine months out of the year.

<sup>2</sup> These various constitutional regulations concerning sessions, adjournments, etc., are found in Art. I, §§ 4-5, and Art. II, § 3.

<sup>3</sup> See p. 413 above.

<sup>4</sup> Sometimes a contest is not decided until the session, or even the Congress, is about to expire.

is administered to the members in a body, except those whose qualifications have been challenged, as just indicated; these are obliged to stand aside, and the oath is not administered to them until their right to membership has been fully established. Having once taken the oath of office, a member can be cut off from official connection with the House (in advance of the expiration of his term) only by death, by resignation, by removal from his state, or by expulsion by a two-thirds vote of his fellow-members.

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The oath of office having been administered, the next business is to complete the formal organization of the House. This ordinarily does not take long—seldom more than a single sitting—although there have been instances in which many weeks were consumed.<sup>1</sup> The first important step is the election of the regular presiding officer, *i.e.*, the speaker. After that, a clerk is chosen, and also a sergeant-at-arms, a doorkeeper, a postmaster, and a chaplain. While the constitution is explicit that all of these officials shall be elected by the House, what actually happens (as will be explained presently) is that the House merely ratifies a slate previously agreed upon by a caucus of the majority members.<sup>2</sup> The speaker is voted for separately; the others usually as a group. None of the officials named, not even the speaker, is required by law to be a member of the House; and, as a matter of fact, only the speaker ever is a member. Each appoints all of the subordinates connected with his office; and all are subject to removal by the House, though no speaker has ever thus been displaced.

Election  
of officers

More will be said about the speaker presently, but at this point the duties of the less important officers may be noted once for all. The clerk is responsible for keeping an accurate record of the proceedings of the House—in other words, the journal which the constitution requires to be kept and to be published from time to time.<sup>3</sup> Copies of the printed *Journal* are furnished to every member, and are also sent to designated officials in every state. The clerk issues, at the direction of the House, all writs, warrants, and subpoenas; he certifies to the passage of all bills and joint resolutions; he makes contracts for supplies or labor required by the House; he keeps and pays the stationery accounts of members,<sup>4</sup> and pays the officers and employees of the House their monthly salaries.

Clerk

<sup>1</sup> For example, in 1855-56.<sup>2</sup> See p. 445 below.<sup>3</sup> Art. I, § 5, cl. 3.<sup>4</sup> For the strange things paid for out of these "stationery" accounts, see *Searchlight on Congress*, IV, 8 (June, 1919); V, 6-7 (Dec., 1920); V, 10-11 (Mar., 1921).

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XXISergeant-  
at-arms

The sergeant-at-arms is required to be present in the House during its sittings, and to maintain order, under the direction of the speaker or chairman of the committee of the whole. If for any reason the office of clerk is vacant, the sergeant-at-arms makes up the temporary roll used at the organization of a new House. He also executes the commands of the House, by summoning absent members, serving subpoenas for witnesses, and in other ways; and it is from him that members obtain their salaries and mileage allowances, as provided by law.

Other  
officers

The doorkeeper enforces the rules regulating admission to the floor of the House, and is required to file with the committee on accounts, at the beginning and end of each session of Congress, an inventory of all furniture, books, and other public property in the committee and other rooms under his charge. The postmaster superintends the post-offices maintained in the Capitol and the House office-building for the accommodation of members and employees. The chaplain is required to be present at the beginning of each day's sitting, and to open it with prayer. All of these offices, and the many subordinate positions attached to them, fall to supporters of the dominant party in the House for the time being; and since party control changes frequently, there is little continuity of personnel, with the result that the work, largely routine but yet important, sometimes suffers.

Adoption  
of the  
rules

After the principal House officers have been elected, it is customary for one of the older members of the majority party to move the adoption of the rules of the preceding Congress. If, as is usually the case—any members feel that the rules ought to be changed, this is the time for them to propose alterations; for, once the old rules are re-adopted without change, it is invariably found next to impossible to bring about reforms in procedure, however desirable they may be as a means of making the House a more effective instrument of democratic government. A few spirited attempts have been made in recent years to introduce such amendments at this stage of proceedings. But they have usually proved futile, largely because the older, more experienced, managers of the House profit by the inherited rules, while the newly elected members are too unfamiliar with the rules as they stand to appreciate the importance of a revision.<sup>1</sup> The old rules having been re-adopted,

<sup>1</sup> Several important changes in the rules were forced through in January, 1924 (soon after the opening of the Sixty-eighth Congress) by a combination of Democrats and the La Follette bloc. See *Cong. Record*, 68th Cong., 1st Sess. (Jan. 14-18, 1924); also *Searchlight on Congress*, VIII, 10-15 (Dec.,

all further proposals for change are automatically referred to the committee on rules—a body regularly dominated by tried leaders of what is commonly called the House “machine,” and even more hostile to innovation than the average run of members. Any suggested modification which in any way threatens the continued control of these men in House affairs is likely to be promptly smothered by the committee and never heard of again, at least until the next Congress organizes. It is theoretically possible, but usually exceedingly difficult, to compel the committee on rules—or, indeed, any other committee—to report on a matter referred to it, if the committee is itself unfavorable to the proposal. Accordingly, it is likely to prove mere beating of the air to advocate important modifications of the rules after the House has completed its organization: the time to accomplish reforms, if any are desired, is at the very opening of the first session of a new Congress.

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The sources from which the rules, as they stand to-day, have been drawn are: (1) the constitution, in so far as its provisions have bearing; (2) the *Manual* prepared by Thomas Jefferson for the guidance of the Senate when he was its presiding officer;<sup>1</sup> (3) the regulations adopted by the House itself from the beginning of its existence, and in early days based largely on the practice of the British House of Commons; and (4) the decisions of successive speakers and chairmen of the committee of the whole, which decisions, in relation to the rules, are as court decisions in relation to statutes. Originally, the rules were few and easily learned; to-day, the formal regulations alone (disregarding the *Manual*, which in 1837 was adopted *en bloc* as governing the House in all cases to which it is applicable, and also leaving out of account the decisions of speakers and chairmen) fill upwards of two hundred printed pages, and form “perhaps the most finely adjusted, scientifically balanced, and highly technical rules of any parliamentary body of the world”—certainly a code so elaborate and complicated that few members ever succeed in mastering it completely. A collection of the rulings of speakers and chairmen of the committee of the whole, though coming down only to 1899, fills eight formidable volumes of a thousand pages each; and the total number of such

How the  
rules have  
developed

1923), and IX, 13-16 (Jan., 1924); Cf. *Polit. Sci. Quar.*, Supp., XL, 66-70 (Mar., 1925). Some changes were made also at the opening of the Seventieth Congress in December, 1927.

<sup>1</sup> Jefferson's *Manual* is printed in 70th Cong., 2nd Sess., House Doc. No. 629, and in various editions of the *House Manual and Digest* and the *Senate Manual*.

decisions, made in the course of interpreting and applying the rules from the chair, now exceeds ten thousand.<sup>1</sup> Steeped in House and parliamentary law as he is, and must be, the speaker requires the assistance of an expert parliamentary clerk, who stays at his right hand ready to advise when a difficult (it can no longer often be a wholly unprecedented) situation arises. The growth of the rules has not, in the main, resulted from periodic revisions, or from wholesale additions or renovations; such general overhauls have been few. Rather, it has come about, chiefly, by gradual adjustment and accretion—old rules being discarded or amplified and broadened, new ones from time to time being brought into play. So far as the character of the resulting procedure is concerned, the outstanding result has been a steadily growing concentration of control over the time and business of the House in the hands of the leaders of the majority party—the speaker, the majority members of the rules committee, the chairmen of the other great committees, the “floor leader,” the “steering committee”—and a corresponding narrowing of the opportunities allowed the minority to interfere with the carrying out of the program of the majority, either by frontal attack in debate, or by resort to obstructive or dilatory parliamentary tactics, known as filibustering.<sup>2</sup>

The  
speaker

Looking somewhat further at what we may call the formal, or regular, machinery of the House—in contrast with certain important agencies and devices (to be noted presently) which are not known to the constitution, to the statutes, or to the rules—our attention is drawn at once to the official who, notwithstanding some heavy losses of power, is still the “central figure in the House of Representatives,” *i.e.*, the speaker. The rules require the speaker to take the chair at the hour appointed for a sitting of the House, to see that the journal of the preceding sitting is read, to preserve order and decorum, and, in case of disturbance or disorderly conduct, to cause the galleries or lobbies to be cleared. He has general control over the hall of the House and of unallotted rooms

Miscellaneous  
powers

<sup>1</sup> The collection referred to, entitled *Parliamentary Precedents of the House of Representatives* (Washington, 1899), was edited by Asher C. Hinds, long a clerk at the speaker's table. A revised edition has been prepared by Congressman C. A. Cannon, of Missouri, who as House parliamentarian had previously compiled a supplement and index-digest to accompany a reprinting of the *Precedents* (1919).

<sup>2</sup> The rules of the House as they stand to-day will be found (in an edition prepared by L. Deschler, House parliamentarian) in 70th Cong., 2nd Sess., House Doc. No. 629 (1929), and in successive editions of the *House Manual and Digest*.

in the House wing of the Capitol. He signs all acts, addresses, joint resolutions, writs, warrants, and subpoenas ordered by the House; decides all questions of order, subject to appeal by any member;<sup>1</sup> puts all questions to a vote; and appoints select and conference committees authorized from time to time by the House. As a member of the House, he retains the right to vote on any question, though the rules provide that he shall not be required to vote "except where his vote would be decisive," or when the House is voting by ballot. He may appoint any other member to serve as presiding officer in his place, for a period not to exceed three days, except in case of illness, when the substitution may be made for ten days; and when he is absent and has failed to provide a substitute, it is permissible for the House to elect a speaker *pro tempore*. In practice, the speaker often calls upon other members to occupy the chair temporarily.<sup>2</sup>

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XXI

The foregoing list of powers and duties conveys only a very imperfect idea of what the speakership has meant in our national legislative history. The office itself, like so many others, was inherited from English political practice by way of our own colonial experience. For centuries, the speakership of the English House of Commons has been an exceptionally dignified and important institution; and an official, bearing the same title and exercising many of the same powers, not only appeared in colonial assemblies and state legislatures prior to the adoption of the constitution, but is found in every one of our state legislatures to-day. The framers of the national constitution left later events to determine which sort of a presiding officer the speaker of our national House of Representatives should become—whether, like his English prototype, a disinterested presiding officer, a moderator of markedly judicial temperament, wholly unidentified with any partisan group within or without the body over which he presides;<sup>3</sup> or an official conforming to the type of speaker which had already developed in American colonial and state legislatures, *i.e.*, an official who, whatever other qualities he might possess, was first and last a political leader and active partisan. As a matter of fact, congress-

English and  
American  
speakers

<sup>1</sup> The rulings of the speaker of the British House of Commons, on the other hand, cannot be questioned. "The chair, like the Pope," a former British speaker (J. W. Lowther) humorously remarked, "is infallible." Rarely are the decisions of the American speaker actually overruled.

<sup>2</sup> The regulations relating to the speaker are set forth in House Rule I, §§ 1-7.

<sup>3</sup> On the English speakership, see F. A. Ogg, *English Government and Politics*, 381-386.

sional speakers, almost from the outset, turned out to be officials of the latter sort; and until within the past two decades, they furnished, in a conspicuous degree, that official political leadership in legislative affairs which is nowhere provided for in our constitutional system, but which in England is supplied by the cabinet. Indeed, until after 1910, the speaker held a position of importance second only, in point of political influence, to that of the president; while in the field of legislation, his influence at times even exceeded the president's.<sup>1</sup>

Powerful  
speakers  
of the past

To this remarkable development of the speakership, several different, though related, factors contributed. In the first place, with but few exceptions, the speakers have been men of marked aptitude for leadership, which had brought them to the front in their respective parties even before their elevation to the speakership; in proof of which one needs but to glance over the long list of persons who have held the office and observe the names of Henry Clay, James K. Polk, Robert C. Winthrop, Schuyler Colfax, James G. Blaine, Samuel J. Randall, John G. Carlisle, Thomas B. Reed, and perhaps Nicholas Longworth. Despite the high political importance which has attached to the office in times past, however, only one speaker ever succeeded in reaching the presidency, although Blaine narrowly missed it. This result has not been altogether fortuitous; for whoever holds the speakership runs grave risks of rousing antagonisms within his party, as happened notably in the case of both Blaine and Reed; and this, of course, makes the attainment of the presidency difficult or impossible. The somewhat weakened speakership of to-day is perhaps not so great an impediment.

Prerogatives of the  
speaker:

1. Deciding  
questions of  
parliamentary  
law

Personality and standing as a party leader may account for the promotion of an individual to the speakership, but they only partially explain the extraordinary power and influence which the speakership, as an office, early developed and to a considerable extent retains. The main reasons for this impressive accumulation of authority are to be found in certain of the speaker's well-known prerogatives. In the first place, the speaker, as has been stated, has the right, not only to put questions and announce votes, but to

<sup>1</sup> The American conception of the speakership, to-day as well as formerly, is very well expressed in Speaker Longworth's statement, upon his election to the office in 1925: "I believe it to be the duty of the speaker, standing squarely on the platform of his party, to assist in so far as he properly can the enactment of legislation in accordance with the declared principles and policies of his party, and by the same token to resist the enactment of legislation in violation thereof." *Cong. Record*, 69th Cong., 1st Sess., p. 382 (Dec. 7, 1925).

decide the multifarious questions of parliamentary law that arise during every session. Appeals can be taken from the chair's decisions, but they are infrequent and can rarely be carried when raised by a minority member or element.

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In the second place, the speaker wields the important power of recognition. Unless formally recognized by the speaker, no member can obtain the ear of the House. This privilege the English speaker endeavors to extend impartially to members of all parties; but the American speaker feels himself under no obligation so to do. To be sure, he is bound to follow the rules of the House; and the rules give a certain precedence to some committees or to their chairmen, and certain days are set apart for the consideration of special classes of business.<sup>1</sup> But, with all due allowance for such limitations, the speaker still has much leeway for exercising his own discretion in granting the floor to members. Again and again, when members have sought to obtain recognition without having previously arranged with the speaker to be recognized, that officer has inquired, "For what purpose does the gentleman rise?"—and then has decided whether or not to recognize him, according to whether the member's purpose met with the speaker's approval. In this way, speakers have often been able to prevent all consideration of motions and bills to which they personally, or the party forces with which they were identified, were opposed.

2. Recognizing members

A favorite expedient of members who want to obstruct the adoption of a measure, or to wear down opposition, is to offer motions designed solely to use up time. Confronted with a situation in which a vigorous Democratic minority seemed likely to make legislation practically impossible, Speaker Reed, in 1890, hit upon the plan of refusing to entertain motions which he regarded as dilatory; and before the end of the year the House, agreeing with him that "the object of a parliamentary body is action, not the stoppage of action," embodied the new policy in a formal rule which is still in force.<sup>2</sup> Such a rule cannot, however, prevent members from slowing up business by exercising their constitutional right to demand the yeas and nays, even though the purpose be plainly dilatory.<sup>3</sup> Another familiar obstructive practice of minority

<sup>1</sup> See p. 463 below.

<sup>2</sup> House Rule XVI, § 10. For a ruling by Speaker Gillett construing "dilatory motion," see *Cong. Record*, 66th Cong., 1st Sess., Vol. LVIII, p. 3114.

<sup>3</sup> Art. 1, § 5, cl. 3. The yeas and nays are not required to be entered in the journal unless one-fifth of the members so request. For a list of motions which on occasion have been considered dilatory, see L. Deschler, *Constitution*, Jef-



groups in earlier times was to leave the House short of a quorum, by refusing to answer to a roll-call designed to determine whether a quorum was present. Speaker Reed overcame this difficulty of the "disappearing quorum," likewise, in characteristic fashion, by instructing the clerks to count as present all members physically present, whether they answered to their names or not; and this procedure also found a permanent place in the adopted rules.<sup>1</sup>

Another prerogative which formerly added immensely to the speaker's power was his right to appoint all committees. Although a sense of obligation to influential leaders who assisted in his election to the speakership, and loyalty to the traditional seniority rule governing committee promotions, tied his hands to some extent, abundant opportunities remained to advance the political fortunes of his friends by appointing them to influential committees, and, on the other hand, to inflict punishment upon those who incurred his displeasure, by relegating them to minor committees, some of which, for lack of anything to do, had not met for decades. Even more important, the speaker could make up committees having charge of great measures like tariff and appropriation bills in such a way as to wield decisive influence upon both the form and the fate of such measures. Especially weighty was the power to appoint the most highly privileged and most powerful standing committee of all, namely, the committee on rules, with which went, also, the right to act as that committee's chairman.<sup>2</sup>

Concentration of such authority in the hands of dominating personalities who were at the same time recognized party leaders went far toward converting the speakership in the days of Reed and Cannon into an instrument of autocratic control over the destiny of both men and measures.<sup>3</sup> The number of members who chafed under the yoke of "Cannonism" increased from year to year as a liberalizing "progressive" movement developed in the ranks of the Republican party; and in March, 1910, a long-awaited opportunity for revolt appeared. At that time, a coalition of in-

*erson's Manual, and Rules of the House of Representatives of the United States*, 70th Cong., 2nd Sess., House Doc. No. 629 (1929), 346-347.

<sup>1</sup> House Rule XV, § 3. Cf. R. Luce, *Legislative Procedure*, 37-46; D. S. Alexander, *History and Procedure of the House of Representatives*, 158-178.

<sup>2</sup> See p. 443 below.

<sup>3</sup> W. B. Hale, "The Speaker or the People," *World's Work*, XIX, 12805-12812 (Apr., 1910). For a defense of the system, see J. G. Cannon, "The Power of the Speaker: Is He an Autocrat or a Servant?," *Century Mag.*, LXXVIII, 306-312 (June, 1909).

surgent Republicans and Democratic minority leaders succeeded—after one of the most spectacular parliamentary battles in the history of the House—not only in deposing Speaker Cannon from membership in the committee on rules, but in enlarging that committee from five to ten members, in the hope of making it more representative of party sentiment in the House; and at the same time the speaker was deprived of the right to appoint the committee. When a new Congress, with the Democrats in control, was organized in the following year, the speaker was stripped completely of the power of committee appointment, except in the case of select and conference committees.<sup>1</sup>

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Exclusion from the rules committee and loss of the right to appoint standing committees left the speaker in a perceptibly weakened position. The great powers of allowing members the floor or refusing it to them, refusing to put motions deemed to be dilatory, ruling members out of order, and deciding vital questions of procedure, however, remain—together with a certain amount of appointing power, and sometimes also important power of reference, *i.e.*, the power to decide to what committee a public bill shall be referred, provided the clerk of the House (who normally makes the assignments in accordance with the nature of the bill) is in doubt. So that, if the speaker no longer rules with the rod of a Reed or a Cannon, and occasionally seems to be hardly more than an agent of the caucus of his party, he is still a force of the first magnitude in the actual work of legislation.<sup>2</sup>

Legislative bodies the world over save time and gain other desirable ends by delegating most of the preliminary work on bills and resolutions to committees of one sort or another; and nowhere is an elaborate committee system more indispensable than in the American House of Representatives, confronted as it is every biennium with anywhere from twenty to thirty thousand different legislative proposals. At the opening of each Congress, the entire House membership is divided into small groups—miniature legislatures, they have been called—each to receive, examine, and “pigeon-hole” or report on measures of a given type or class

The  
committee  
system

<sup>1</sup> C. R. Atkinson, *The Committee on Rules and the Overthrow of Speaker Cannon* (New York, 1911); C. R. Atkinson and C. A. Beard, “The Syndication of the Speakership,” *Polit. Sci. Quar.*, XXVI, 381-414 (Sept., 1911).

<sup>2</sup> G. R. Brown, *The Leadership of Congress* (Indianapolis, 1922), Chaps. x-xi; D. S. Alexander, *History and Procedure of the House of Representatives*, Chaps. iv-v. A sketch of the varying fortunes of the speakership since the changes of 1910-11 will be found in P. D. Hasbrouck, *Party Government in the House of Representatives* (New York, 1927), Chap. I.

referred to it during the ensuing two years, and in some cases also to take the initiative in framing bills. In addition to these "standing" committees, select committees are sometimes appointed to deal with particular matters; and there are also, from time to time, conference committees whose function it is to confer with similar committees of the Senate on legislation on which the two houses have been unable to agree.

Number and  
importance  
of com-  
mittees

Originally, the standing committees were few in number. But, partly owing to the increased volume of legislative business, partly on account of the desire to have many committee chairmanships (carrying some distinction, and frequently more tangible perquisites) to distribute, and partly by reason of the natural tendency, once a given committee was established, to continue it regardless of its usefulness, the number grew until it reached a maximum, some years ago, of sixty-one. At the opening of the Seventieth Congress (December, 1927), there was, however, a long-needed trimming of the list, which (with the addition of one new committee) left the number at forty-six.<sup>1</sup> Even of the survivors, only about a dozen can be said to be of large importance: chiefly the committees on ways and means, appropriations, judiciary, banking and currency, interstate and foreign commerce, rivers and harbors, post-offices and post-roads, agriculture, military affairs, insular affairs, naval affairs, and rules. Now and then matters take such a turn as to give temporary prominence to other committees, as happened in the case of the committee on foreign relations when the United States entered the World War. Furthermore, a few committees which are now seldom heard from were, in times past, of great importance, for example, the committee on territories.

Size of  
committees

In size, House committees range all the way from two members up to thirty-five, in the case of the reorganized committee on appropriations. Twenty-one is, however, the standard number. Members rarely serve on more than three standing committees, and the majority belong to only one.<sup>2</sup> On every committee, both parties, and sometimes third parties, are represented, in ratios varying according to the distribution of party strength in the House from Congress to Congress. Thus, in the Seventy-first Congress (1929-31), which was strongly Republican, the quotas (in the usual committee of twenty-one) were fourteen Republicans and seven Demo-

<sup>1</sup> Lists of House committees, with membership, are printed in successive issues of the *Congressional Directory*.

<sup>2</sup> Under present practice, members placed on any one of the ten or more major committees are never given any other standing-committee assignment.

crats; but in the Seventy-second Congress (1931-33), in which the Republican margin is very slender, they are—as agreed on in advance by the party leaders—twelve and nine respectively. Twenty-three of the more important committees meet regularly on certain days each week; the others meet, if at all, at the call of the chairman.

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From the earliest days down to 1911, standing committees were appointed by the speaker, as select and conference committees still are. Since the date mentioned, the House itself has elected, at the beginning of each Congress, subject to the qualification that what the body as a whole does is merely to ratify lists prepared in advance and presented to it. During eight years of Democratic control (1911-19), these committee lists were prepared by the regular committee on ways and means, subject to the approval of the majority and minority caucuses. The majority members on this committee were chosen in the majority caucus at the opening of each new Congress; the minority members of the committee were similarly chosen in the minority caucus. The chairman and other majority members of all the remaining committees were then selected by the majority members on this "committee on committees," and the minority members on each committee were in a similar manner named by the minority of the committee on committees. Then the action of these two groups, having first been approved by the respective party caucuses, was reported to the House, which proceeded to the formal election.<sup>1</sup>

Mode of  
appoint-  
ment

The committee on ways and means<sup>2</sup> thus continued to serve as a general committee on committees until the Republicans regained control of the House in 1919 and, by caucus action, created, for their own use, a special committee along new lines. This new committee of selection was made to consist of one member from each state having Republican representation in the House, which meant at that time a committee of thirty-six members. Furthermore, in making committee assignments, each member was permitted to cast a number of votes equal to the number of Republican representatives from his state. This resulted, in 1919, in giving the various members of the committee of selection all the way from

New Repub-  
lican com-  
mittee of  
selection  
(1919)

<sup>1</sup> It should be added that in the second Congress after this procedure was introduced the plan was modified, in detail, though not in fundamentals, by the action of the Republican caucus in delegating to its floor leader the function of assigning all minority committee positions.

<sup>2</sup> The chairman of this committee was also the majority floor leader until 1919. The minority floor leader has usually been the party's unsuccessful candidate for the speakership.

one to twenty-nine votes; only ten members had as few as one or two votes, while nine had more than ten votes apiece. The Republicans still adhere to this plan. The Democrats, however, continue to employ as their organ of selection the Democratic members of the ways and means committee.

The method followed in allotting committee chairmanships and arranging committee members in a recognized order of priority permits little or no consideration to be given to experience, training, or other qualifications. Disregarding these matters almost completely, the committees and caucuses, except at rare intervals—especially when questions of party “regularity” are involved<sup>1</sup>—religiously adhere to the traditional rule requiring all chairmanships, and indeed committee positions generally, to be assigned on the basis of seniority, *i.e.*, length of continuous service in the House. A new member has thus practically no chance of securing the chairmanship of a single committee, even though he be a man of much eminence and ability. Indeed, he counts himself fortunate if he secures the lowest position on a committee of secondary, rather than of tertiary, importance. The names of new members are almost always placed at the bottom of the committee rolls, on both the majority and the minority side of the House. If a member succeeds in being reelected several times, he will gradually make his way up toward a chairmanship. When finally he stands next to the chairman of a given committee in point of seniority, he is spoken of as the “ranking member;” and when the next vacancy occurs in the chairmanship, his claim, based upon length of service, and perhaps nothing more, will be held superior to all other claims, provided his party is still in control of the House, and provided, further, that his own record in the House has been marked by a satisfactory degree of “regularity.”<sup>2</sup>

The nature of the legislative measures assigned to the important committees mentioned above is sufficiently indicated by the committee titles, except, perhaps, the committees on ways and means, appropriations, and rules. The committee on ways and means has charge of all revenue, including tariff, measures.<sup>3</sup> The committee on appropriations, reorganized in 1920, now has juris-

<sup>1</sup> As, for example, in the case of the “Republican” members who supported La Follette for the presidency in 1924.

<sup>2</sup> Hasbrouck, *op. cit.*, 48-55. For a thoughtful defense of the seniority principle, see J. K. Pollock, Jr., “The Seniority Rule in Congress,” *No. Amer. Rev.*, CCXXII, 235-245 (Dec., 1925-Feb., 1926).

<sup>3</sup> See pp. 552-557 below.

diction over all appropriations, and is frequently referred to in the press as the budget committee. The rules committee is, in the last analysis, the most powerful of all regular, or official, House committees, chiefly because of the inherent nature of its functions, but also partly because, along with ten other committees, including those on ways and means and appropriations, it enjoys the advantage of being permitted to report to the House at any time. "It shall always be in order," says a prominent section of House Rule XI, "to call up for consideration a report from the committee on rules . . . and, pending the consideration thereof, the speaker may entertain one motion that the House adjourn; but after the result is announced he shall not entertain any other dilatory motion until the said report shall have been fully disposed of."<sup>1</sup>

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The committee on rules—existing as a select committee from 1789—was first made a standing committee in 1880, though not until some years later did its potentialities as an organ of majority control begin to be realized. Successive rulings of the speaker and orders of the House gradually invested the committee with power to control practically the entire order of business by means of special rules to meet special situations as they arose—in particular, rules or orders calling up a particular bill for immediate consideration. Prior to the revolution of March, 1910, the speaker not only served as chairman of this committee, but appointed the other four members, who were naturally men of disposition and opinions similar to his own. He, with the chairmen of the ways and means and appropriations committees, entirely dominated it; and it was Speaker Cannon's official connection with this committee, and the highly dictatorial character of the special orders which it brought in, that enabled that picturesque figure to wield well-nigh absolute control over all important legislation, and almost literally to determine what might and what might not be considered by the House. The speaker's withdrawal from membership in the committee, the transfer of the actual selection of its members to agencies of party caucuses, and the increase of these members to ten, and later to twelve (eight representing the majority and four the minority), left the speaker with perceptibly diminished power, but did not of themselves lessen the control of the committee over the legislative work of the House. As we shall see, that control has

Control of  
House  
business by  
the com-  
mittee on  
rules

<sup>1</sup> In practice, this rule has been modified somewhat. A report of the committee on rules is not in order when the House has voted to go into committee of the whole; also a conference report has precedence over it.

in later days been cut down somewhat in actual practice by the rise of two new agencies of the majority caucus, the "steering committee" and the majority floor-leader, with the result that, aside from the chairman, the members of the committee are no longer, as they once were, the dominant personalities of the House. But inasmuch as the rules committee is commonly the medium through which these newer authorities accomplish their purposes, the committee is still to be regarded as an instrumentality of great potency and importance. Not only may it—by the special rules which it proposes, and which the regimented House majority generally adopts—limit the time of debate allotted to measures, but it may specify what sections can be amended, and the number, and even the nature, of permissible amendments.<sup>1</sup> Moreover, it may at any time interrupt the discussion of a measure and, by another special rule, thrust forward some other bill for consideration. Insurgents now and then catch the House managers napping, and succeed in getting a certain bill before the House contrary to the intentions of the "machine." But in such an emergency, the committee on rules can always be hurriedly convened and a special rule to meet the situation quickly devised and reported, not only interrupting consideration of the insurgent measure, but indefinitely side-tracking it in favor of other business. Furthermore, the committee on rules has been known to draft a bill over night, introduce it in the House the next morning, and force its passage the same day, without any opportunity whatever for reference to a standing committee.<sup>2</sup> In so far as this sort of thing takes place, the House has virtually abdicated its rights as a deliberative law-making body.<sup>3</sup>

The  
caucus

The speaker and other officers, the committees and their chairmen—even the powerful rules committee—are agencies of the House as such, designed to enable it to carry on business expeditiously and effectively. This formal machinery is, however, only part of the mechanism of House control. Enveloping it, and frequently exceeding it in actual power, is an "invisible government"

<sup>1</sup> Special orders of this sort are sometimes called "gag-rules." Use of them has increased rapidly in recent years. See *Amer. Polit. Sci. Rev.*, XIX, 764-765 (Nov., 1925).

<sup>2</sup> This happened in the case of a ship subsidy bill in 1915. See L. Haines, *Your Congress*, 94-96.

<sup>3</sup> For interesting illustrations of the use of "special rules" in the special session of the Seventy-first Congress, called to deal with farm relief, see *Amer. Polit. Sci. Rev.*, XXIV, 43-57 (Feb., 1930). Reliance on special rules as a means of expediting and controlling proceedings is steadily growing, and hardly any important legislation is enacted nowadays without the aid of them.

developed by party practice and quite unknown to the rules. This extra-legal government consists primarily of the party "conferences," or caucuses, but includes two further instrumentalities created by the caucuses, *i.e.*, the majority party's "steering committee" and the majority and minority floor leaders.<sup>1</sup>

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The caucus is a private meeting of the members of the House who belong to a given party. Long before 1910, such gatherings were common enough, in both majority and minority usage; and after the "revolution" of that year and the succeeding one—to be more explicit, after the speaker's loss of power to appoint committees—the majority caucus assumed an almost unlimited control over House organization and procedure. In later years, both majority and minority caucuses have met less frequently. But even yet the operations of the majority caucus extend—at all events may extend—to not fewer than five important matters: (1) the selection of House officers; (2) agreement upon plans for united action on policies or measures before the House; (3) listing of members to be elected to the various standing committees; (4) supervision and control of the reports of important committees; and (5) the actual shaping of the detailed provisions of leading legislative measures.

Activities  
of the  
majority  
caucus

The constitution provides that the House shall elect its speaker and other officers; and in form the regulation is complied with, as we have seen. Actually, however, what the House does is merely to ratify the slate of officers previously agreed upon in the secret, unofficial, caucus of the majority party,<sup>2</sup> and, in view of the strictness of party discipline which usually prevails, the decision of a majority of that unofficial body determines the formal action

Selection  
of the  
speaker  
and other  
officers

<sup>1</sup> The term "caucus" has fallen into disrepute among congressmen in recent years, and has largely been superseded by the term "conference." The device is the same, however, by whatever name designated.

<sup>2</sup> This caucus may be held long in advance of the date of formal organization of the new Congress. Thus, the Republican members of the Sixty-ninth Congress (which was expected to be—and actually was—organized in December, 1925) met on February 27 preceding, during the closing days of the Sixty-eighth Congress, and by a vote of 140 to 84 "nominated" Mr. Nicholas Longworth, majority floor leader, for the speakership. Organization of the Democratic minority was effected on the following day, and the floor leader, Mr. F. J. Garrett, was selected to oppose Mr. Longworth for the speakership. The Republican committee on committees, also, met on March 5 and took up the task of assigning Republican members to the various standing committees. Similar procedure was followed in 1927 in preparation for the Seventieth Congress. The Seventy-first Congress met in special session on April 15, 1929, and the preparatory caucuses were held between the 1st and 5th of the preceding month. In February, 1931, the Republican conference renominated Mr. Longworth for speaker in the Seventy-second Congress, which was expected to be organized in December of that year.



of the House as a whole.<sup>1</sup> It has long been quite possible, therefore, for a member to be elected speaker who is not favored by a majority of the House as a whole, especially when there has been a close caucus vote in the choice of candidates.

The use of the caucus to bring about united action of the party members in supporting or opposing measures of large importance, after they have come before the House, reaches far back in our legislative history. But to this and the foregoing function, later developments have added others no less weighty. First of all, the majority caucus inherited the speaker's power of appointment. At the same session when this devolution occurred, the majority caucus assumed, also, the right to review and control the action of the most important committees before they reported to the House. This was accomplished by the adoption of a resolution in the Democratic majority caucus, in April, 1911, which directed the Democratic members of the various committees of the House not to report to that body on important legislative measures until they had first communicated their proposed action to the caucus and had received permission from that body to report. Shortly after this, we find the majority caucus debating the details of important bills, and even assuming the task of perfecting the provisions of legislative measures before those measures were brought up for consideration on the floor of the House. Thus, every important clause of the Glass currency bill of 1913 (afterwards passed under the name of the Federal Reserve Act), and also of the Clayton anti-trust measures adopted in the following year, was whipped into final shape in the Democratic caucus before the bills appeared in the House at all. The Republican caucus functioned hardly less actively in connection with the Smoot-Hawley tariff act of 1930.<sup>2</sup>

Two of the principal instrumentalities through which the majority caucus functions are the "steering committee" and the majority floor leader. The steering committee consists of a varying number of leading majority members (ten at present, including the floor-leader as *ex-officio* chairman), chosen by the majority caucus to exercise continuous supervision over the handling of business by the House. Sometimes the committee is made up specially for

<sup>1</sup> The vote on the caucus nominees for speaker has come to be the critical test of party allegiance.

<sup>2</sup> For example, the House, in pursuance of Republican caucus action, adopted a "gag" rule under which no amendments to the bill could be considered except such as were proposed or endorsed by the Republican majority of the ways and means committee.

the purpose; sometimes it comprises simply the majority members of one of the great standing committees, *e.g.*, the ways and means committee, designated by the caucus; but in any event it keeps the parliamentary situation in hand, whips faltering members into line, and in sundry effective ways sees that the will of the caucus is carried out. The committee's main business is (1) to select from the great mass of bills which encumber the House calendars those which the majority managers wish to advance to final consideration, and, after they have been decided upon, (2) to keep the tracks clear—with the powerful assistance of the committee on rules—for favorable action upon them. Naturally, its busiest moments are in the last crowded days of a session. Steering committee meetings are regularly held in the office of the speaker, and are attended by the speaker, the chairman (or some other member of the rules committee), and such other committee chairmen as may be called in from time to time.<sup>1</sup>

The chairman of the steering committee—also designated by the caucus—is the floor leader; and at the present time this extralegal dignitary is almost equal in power to the speaker, from whom, indeed, he has inherited many prerogatives. He keeps informed on the drift of opinion among his colleagues, persuades and admonishes in the interest of party harmony, plans the course of debate and indicates to the speaker what majority members are to be given the floor on particular measures, and confers with the minority leader—for the opposition has a similar leader, usually its unsuccessful candidate for the speakership, and, of course, chosen by the caucus—on the time at which votes shall be taken. A few years of experience as floor leader, such as a recent speaker, Mr. Longworth, had, is usually the best asset of a candidate for the speakership.<sup>2</sup>

<sup>1</sup> Speaking in the House on June 18, 1926, Mr. Pou, ranking minority member of the rules committee, declared: "It cannot be denied that the steering committee is all-powerful. It can and does forbid the consideration of any measure to which a majority of the steering committee is opposed. This may be a surprising statement to some, but the steering committee is more powerful than any of the regular constituted committees of this House. It is more powerful than the committee on rules, because the majority of the committee on rules will not report any special rule in defiance of the mandate of the steering committee, which is the great super-committee of this House, with power to kill and to make alive." *Cong. Record*, 69th Cong., 1st Sess., Vol. LXVII, p. 11528. The House minority has no instrumentality corresponding to the steering committee.

<sup>2</sup> On the floor leaders, see D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. VII; and on the "invisible government" of the House, G. R. Brown, *The Leadership of Congress*, Chap. XII.

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of the  
caucus

Obviously, therefore, a person who views House organization and procedure merely through the medium of the official machinery and the formal rules is in danger of missing much that goes to make up the actualities of congressional lawmaking and finance. Indeed, it is far from easy for an outsider to appreciate the dominant position which the caucus and its agencies now hold. To understand it, one must have some notion of the effectiveness of party discipline in a body elected, organized, and largely conducted on strictly party lines. The caucus is naturally controlled by a comparatively small group of experienced leaders, well versed in the intricacies of House procedure and skilled in the art of managing their less experienced colleagues; and in their hands it has become an instrumentality through which the rank and file—especially the newer members, unfamiliar with the ways of the House—are kept in strict tutelage. All party members, whether in attendance at a caucus or not, are bound by the action taken unless released by the caucus itself; and the only grounds upon which members are likely to be released are constitutional objections and pledges to constituents to take a different course from that decided upon by the caucus.<sup>1</sup> Any one who refuses to abide by a caucus decision—who, in other words, commits the unpardonable sin of “bolting”—takes his political life in his hands, and must expect to be marked for discipline in various effective ways. He is likely to lose his place on important committees when the next assignments are made; the measures in which he has a peculiar personal interest will probably be side-tracked; appropriations to be expended in his district may be cut off, or sharply curtailed; and in various other ways he may be made to feel the disapproval of the leaders for his refusal to “go along.”

The ne-  
cessity of  
leadership

Needless to say, the power of the caucus and its agencies, and the ways in which that power is used, stir much discontent. The stifling of individual initiative, the penalizing of independence, the relentless use of the “steam roller,” drive members to insurgency and inspire attempts to build up *blocs* which will cut across caucuses and party lines. The simple fact is that, although the effective functioning of such a body as the House of Representatives presupposes leadership, no provision whatsoever for congressional leadership is made in the constitution or the laws. Under parliamentary systems of government, such as the English, legis-

<sup>1</sup> The action of a Democratic caucus, it should be noted, is binding upon members only if two-thirds have concurred.

lative leadership devolves naturally upon the cabinet. But our government is not of that sort, and it has fallen to the House to work out its own way of meeting the need. It has done this, according to no preconceived plan, but largely as the exigencies of party politics have determined. The results have been different in different periods. Once it was the speaker who guided. Again, it was the speaker and the rules committee; still again, the ways and means committee; and now it is chiefly the caucus and its agents—which means that leadership is, and for a good while has been, “in commission.”<sup>1</sup> Always there has been dissatisfaction on the part of individuals and elements that have found themselves with less independence and power than they felt they ought to have; revolt has followed revolt, only—speaking broadly—with the result, at best, of transferring supreme control from one point in the system to another, *e.g.*, from the speaker to the caucus. Leadership by the president is sometimes an important factor. But at best it has to be exerted from the outside, and sometimes it is not forthcoming at all. In any event, the House must find leadership in its own ranks; and the quest for a leadership that will not be also a dictatorship goes on unceasingly.

The present scheme of things does not, of course, lack apologists, and some of their arguments have a good deal of weight. There must, they say, be rules and procedures and people who will take matters into their own hands and give necessary guidance; and these rules and leaders will inevitably seem harsh and arbitrary to men in a hurry to make the world over by act of Congress. But the system as it stands must be taken as reflecting the wishes of the majority of the members. A dissatisfied majority can change it at any time. An arbitrary speaker can be overruled, or even deposed, by a majority vote. Committees may be reconstituted and compelled to report upon any matter referred to them, by a procedure which can be started by petition of a majority of the members. Therefore, runs the argument, since the rules and other features of the system remain substantially unaltered from Congress to Congress, they must be regarded as fairly satisfactory to

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XXI  
Is the  
system  
justifiable?

<sup>1</sup> “Speaker Cannon could promise Roosevelt that the House would do certain things, and the things would be done. There is no one now in the House to make such promises. Its control is shared by the floor leader, the speaker, the rules committee, the committee on committees, the steering committee, and the chairmen of the more important legislative committees. The president will find it difficult to lead the House if there are no authoritative agents with whom he may deal.” L. Rogers, in *Amer. Polit. Sci. Rev.*, XVIII, 92-93 (Feb., 1924).

all but a few unreasonable members who are unable to adapt themselves to the ways of the majority.

Speaking strictly, all this, of course, is true. Nevertheless, the argument contains a fallacy. The majority referred to is usually fictitious; the existence of the two rival party organizations, functioning through caucus action, in which the influence wielded by the experienced managers who profit by the old system has a wholly disproportionate weight, makes House majorities for any of the purposes named practically impossible. Actually, the degree of independence enjoyed by individual members—except such as are willing to be labelled insurgents—is exceedingly small. Opportunities, in connection with really important matters, to act solely as their best judgment dictates rarely arise; and situations in which a coalition between a united minority party and a dissatisfied or insurgent faction within the dominant party can be made more than momentarily effective are still more uncommon. It is, therefore, nearer the truth to say that the rules of the House, the power wielded by the speaker and the committees, and consequently the fate of many weighty bills, are in reality determined, not by the majority of the entire House, but rather by the majority in the caucus of the dominant party, which may in fact represent the views of only a minority of the House as a whole.<sup>1</sup>

Organiza-  
tion of the  
Senate

Crossing over to the opposite end of the Capitol, one finds a form of organization broadly resembling that of the House, yet different at a number of points. One element of difference arises from the fact that, whereas the House has to be reorganized from the ground up every two years, the Senate—only a third of whose members retire at a given time—has a continuous existence, and to a considerable extent a continuous organization. When a new Congress meets, Senate committees are reelected, with necessary changes of personnel, and any vacancies in such offices as president *pro tempore*, secretary, and sergeant-at-arms are filled. But the organization as it stands is regarded as having been continuous since the Senate first met in 1789.

The  
president

In the second place, the Senate's presiding officer, termed the president, occupies a position widely different from that of the speaker of the House. To begin with, he is, by terms of the consti-

<sup>1</sup> For conveniently arranged current information on the machinery of the House and its workings, see articles by Arthur W. Macmahon dealing with successive sessions and published from time to time in the *American Political Science Review*.

tution, the vice-president of the United States, and hence is not chosen by the body over which he presides. Partisan and factional contests over the filling of the chair, such as have punctuated the parliamentary history of the House, have no place in the annals of the Senate—save as occasionally stirred by election of a president *pro tempore* to preside when the president is absent or when the office is vacant. Furthermore, the presidency of the Senate carries with it little of the power over parliamentary proceedings which is associated with the speakership in the House. Not being a member, the president may not vote on measures coming before the Senate, except to break a tie; otherwise, it would happen that the state from which he came would have three votes—his own and those of the state's two senators. From April, 1789, when the Senate was first organized, to March 4, 1915, there were one hundred and seventy-nine instances of the use of the casting vote, by twenty-one different presiding officers, the great majority occurring in connection with comparatively unimportant matters.<sup>1</sup> As a presiding officer, the president much more nearly resembles the English speaker, or better, the Lord Chancellor, who presides in the House of Lords, than does the speaker of the House. He is a presiding officer, or moderator, and nothing more. As such, he puts questions to a vote, recognizes members, and decides points of order, subject to appeal by any senator, and subject, further, to the practice of leaving specially difficult questions of order to decision by the Senate itself. Unless a person of extraordinary force, which rarely has been the case, and also of high standing in his party, he never seeks to play the rôle of a political leader in the Senate, much less to influence senatorial action.<sup>2</sup>

In the third place, the Senate is a much smaller body than the House, containing but slightly more than one-fifth as many members. The number of officers and standing committees is not widely different, and the extra-legal agencies of party authority are quite as much in evidence. Power, however, is less effectively concentrated in the hands of a few managers. The party caucus, or

<sup>1</sup> These cases classify as follows: in connection with nominations 13; treaties, 3; elections of officers and questions of organization, 7; procedure, 39; bills and resolutions (general), 91, (local) 5, and (private) 21. H. B. Learned, "Casting Votes of Vice-Presidents," *Amer. Hist. Rev.*, XX, 571-576 (Apr., 1915), *idem*, "Some Aspects of the Vice-Presidency," *Amer. Polit. Sci. Rev.*, Supp., VIII, 162-177 (Feb., 1913).

<sup>2</sup> An obvious exception is, of course, Vice-President Charles G. Dawes (1925-29), who not only waged a popular campaign for a revision of the Senate's rules but was active in promoting certain proposed legislation, particularly the McNary-Haugen farm relief bill and the McFadden branch-banking bill.

"conference," with its subsidiary steering committee, floor leader, and "whip," exists, to be sure; but neither conference nor steering committee wields the unshakable control over proceedings exercised by the corresponding agencies in the House. Individual senators, majority and minority, enjoy larger freedom of action and possess decidedly more extensive powers of obstruction and decision than do representatives. Even the committee on rules has no such autocratic position as the House committee.<sup>1</sup>

Similari-  
ties in  
Senate and  
House or-  
ganization

While it can thus be seen that there are important, and even fundamental, differences in the organization of the two branches of Congress, there are, at the same time, numerous points of similarity. The same dual party system, for example, appears in both houses, giving color and character to the entire organization and to much of the procedure. Each house has its elaborate system of standing committees, not a few of them bearing the same names in the two branches. The most important Senate committees<sup>2</sup> are the finance committee, which corresponds to the House committee on ways and means; the committee on foreign relations, to which are referred all treaties and all presidential nominations to posts in the diplomatic and consular services; the judiciary committee, to which are referred nominations to judgeships and to other positions connected with the federal courts; and the committee on interstate commerce, whose work relates to railroads, to telegraph, telephone, pipe-line, and express companies, and to anti-trust legislation. Until a decade ago, Senate committees were even more numerous than House committees, and many were quite as useless as were some of the latter; the committee on transportation routes to the seaboard, for example, not having had a meeting for more than forty years. But this particular committee, along with upwards of two score others, was lopped off in April, 1921, when the Senate committee list underwent a pruning which reduced the total number from seventy-four to thirty-four.<sup>3</sup> Eight of the present number hold regular weekly meetings; the others meet on call of the chairmen. In size, Senate committees run from three members up to seventeen in the case of the most important ones; and committee positions are divided between the two parties in about the

Senate  
committee  
system

<sup>1</sup> G. R. Brown, *The Leadership of Congress*, Chap. xiv. It may be noted that in the Senate the minority, as well as the majority, has a steering committee.

<sup>2</sup> For a complete list of the thirty-four committees, and of committee assignments, see any recent edition of the *Congressional Directory*.

<sup>3</sup> *Searchlight on Congress*, V, 6-8 (Apr., 1921). The number is now (1931) thirty-three.

same ratio as in the House. In contrast with members of the lower chamber, a majority of whom belong to only one committee, most senators must serve on four or five, which is an unfortunate circumstance. An obvious remedy would be to reduce the size of committees.

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The method of making up committee lists in the Senate is substantially the same as that prevailing in the House. Each party caucus appoints a committee to distribute committee positions, including chairmanships; and when these committees complete their work, it is approved by the caucuses and afterwards reported to the Senate for formal ratification. Rarely or never are any changes made after the lists reach the Senate.

How com-  
mittees are  
made up

At one time, the Senate committee system was criticized sharply, even among senators themselves, on the ground that the chairmen or ranking members of a few important committees were able to exert a disproportionate influence upon legislation because of the rule which required them to be appointed to the conference committees that adjust most of the differences arising over measures passing the two houses in dissimilar form.<sup>1</sup> In the Sixty-fifth Congress, for example, one hundred and five conference committees were appointed, and five senators served on eighty-two of them. Senator Smoot served on thirty-three; Senator Warren, on twenty-three; Senator Nelson, on eleven; Senator Lodge, on nine; and Senator Penrose, on six.<sup>2</sup> This situation was remedied to a degree in 1919, when a rule was adopted forbidding any senator to be chairman of more than one of the ten most important committees or a member of more than two such committees.<sup>3</sup> Except as modified by this regulation, the seniority rule holds sway in the Senate to practically the same extent as in the House.

The Senate, likewise, has its body of printed rules, and its parliamentary precedents; and it falls back upon Jefferson's *Manual* to a greater extent than does the House. The Senate rules are fewer than those of the House, and, being simpler also, are more easily mastered. The minor officers of the Senate correspond very closely to those of the House. The secretary is chosen in the same manner as the clerk of the House, and performs similar duties, aided by a staff of upwards of thirty subordinates. There is,

Rules  
and  
miscel-  
laneous  
officers

<sup>1</sup> *Searchlight on Congress*, IV, 9-10, 23-26 (June, 1919).

<sup>2</sup> *Amer. Polit. Sci. Rev.*, XIV, 75-76 (Feb., 1920).

<sup>3</sup> These committees are appropriations, agriculture, commerce, finance, foreign relations, interstate commerce, judiciary, military affairs, naval affairs, and post-offices and post-roads.



likewise, a sergeant-at-arms, who performs duties which at the other end of the Capitol are divided between the sergeant-at-arms and the doorkeeper. Lastly, the Senate has its own postmaster and its own chaplain.

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## CHAPTER XXII

### CONGRESS AT WORK

We have seen how the two branches of Congress are constructed, and have brought to view the machinery with which they are equipped. How does this machinery function? How does Congress actually carry on its work?

To begin with, the physical setting is not without interest. Both houses have their meeting place in the capitol building in Washington, a vast sandstone and marble structure situated on the brow of a low hill overlooking the city, the winding Potomac, and the heights of Virginia beyond.<sup>1</sup> The House of Representatives has occupied since 1857 a large rectangular hall in the south wing of the building; the Senate, transferred in 1859 from the room now used by the Supreme Court, sits in a similar but smaller chamber in the north wing. As in legislative halls of Continental Europe, though not in England, the seats in each room are arranged in concentric rows, theater-fashion, facing the marble platform on which the presiding officer sits; and deep galleries provide space for several hundred spectators. Formerly, the hall of the House of Representatives was fitted with separate desks for the members; and the Senate chamber is still so equipped. But the growth of numbers in the lower branch made it necessary, after the reapportionment of 1911, to remove (in 1913) the individual desks, leaving only the seats, in close proximity, as in a theater. Two tables are, however, conveniently placed for the use of committees whose reported bills are up for consideration—one on each side of the center aisle, near the aisle and well toward the front. At one of these, the majority members of the reporting committee take their station; at the other, the minority members. So far as practicable, Republican members of the House sit together on one side of the

Physical  
surround-  
ings

<sup>1</sup> G. Brown, *History of the United States Capitol* (2 vols., Washington, 1900-03). Even the fact that the national capital is situated as far south as Washington has its significance. Many a session of Congress has been rushed to a close, and bills killed or postponed, wholly or partly because of the uncomfortable temperatures prevailing in the Potomac area between May and October.

chamber and Democratic members on the other. The seats of individual representatives are assigned, at the beginning of a session, by lot; although in point of fact they are not occupied regularly, and a member entering the hall when business is going on is likely to take any seat, not then in use, that happens to strike his fancy. In the Senate, where there is never a general vacating of places, a newcomer claims for himself any seat not already belonging to a member, and as a rule occupies it regularly. The physical equipment of the legislative branch further includes numerous committee rooms in the Capitol, an immense marble office-building for the members of each house, a library in the Capitol, and the separately housed Library of Congress, which is the largest library in the United States and the third largest in the world.<sup>1</sup>

Time  
devoted  
mainly  
to con-  
sidering  
and passing  
bills

Each branch of Congress has certain functions which the other does not share, *e.g.*, the confirmation of appointments by the Senate and the preparation of impeachment proceedings by the House. But by far the greater part of the members' time is taken up with the consideration of bills and resolutions which become effective only after being adopted in identical form by both chambers; that is to say, the two houses spend most of their days working at the same sort of thing, though not, of course, on the same bills or resolutions simultaneously. Some of the measures on which they deliberate are designed to make or modify law, in the strict sense of the term; many others are intended, rather, to give directions to the officers of the government, and are therefore, in essence, only administrative orders.<sup>2</sup> But the same machinery is employed for both kinds of measures; the product is indiscriminately termed "statutes;" and so long as we are dealing with matters of procedure, the distinction of content has little importance except at one point, namely, in relation to the handling of finance bills.<sup>3</sup>

How, then, does Congress "legislate?" To answer the question, we must briefly trace the successive steps normally taken between the time when a proposal is put into the form of a bill and the final publication of the measure as law.

The constitution requires that all bills for raising revenue shall originate in the House of Representatives. Every other kind of

<sup>1</sup> H. Putnam, "Our National Library," *Rev. of Revs.*, LXXIX, 58-63 (Feb., 1929).

<sup>2</sup> See pp. 523-524 below.

<sup>3</sup> The process of finance legislation necessarily falls within the scope of later chapters analyzing the government's financial powers (Chaps. xxv-xxvi). Accordingly, it is not treated at this point.

How  
measures  
are intro-  
duced

measure may make its first appearance in either house; indeed, through its right to amend revenue bills, even to the extent of substituting new ones, the Senate may, in effect, originate them also.<sup>1</sup> In England and some other countries having a parliamentary, or cabinet, system of government, the ministers, who are themselves, of course, members of Parliament, introduce almost all of the important public bills.<sup>2</sup> The ordinary non-ministerial member, knowing that measures which he introduces are unlikely, under the rules, to receive attention, rarely becomes the author or sponsor of a public bill. In our Congress, there are no ministerial members. Bills and resolutions may be suggested by the president or the head of an executive department, who may even assist in framing them; but they can be got formally before Congress only by being introduced by a person who is merely an ordinary member of one of the two houses. The most important measures, such as tariff and currency bills, usually emanate from the appropriate committees. But any member may at any time get a bill or resolution on the calendar of the house to which he belongs by simply depositing a copy of it, endorsed with his name, in a box on the clerk's table, or (in the case of a public bill) handing it to the presiding officer. If he wants assistance in drawing up his measure, he can get it from the legislative drafting service, of which there is a branch for each of the two houses. This service was established in 1918, in connection with a legislative reference service for which the first appropriation was made in 1915.<sup>3</sup>

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The number of bills and resolutions presented every session is amazing. On an average, the House of Representatives receives fifteen thousand during a long session, and the Senate a third as many, or more.<sup>4</sup> This is not merely because of the ease with which

Multiplic-  
ity of bills

<sup>1</sup> See pp. 473-474 below.

<sup>2</sup> A public bill is a measure which is of general application, in distinction from a private, or special, bill, which applies only to particular persons or places.

<sup>3</sup> H. Putnam, "Legislative Reference for Congress," *Amer. Polit. Sci. Rev.*, IX, 542-549 (Aug., 1915); F. P. Lee, "The Office of the Legislative Counsel," *Columbia Law Rev.*, XXIX, 381-403 (Apr., 1929).

<sup>4</sup> If the several thousand special bills which nowadays are usually grouped in eight or ten omnibus pension bills be counted separately, the figures will, of course, be very much larger. Even counting in the omnibus bills only, 23,250 bills and 638 resolutions—a total of 23,888—were introduced in the Sixty-ninth Congress, organized in December, 1925. Eight omnibus pension bills in that Congress embodied 5,998 individually proffered measures, of which 5,533 were acted on favorably. A total of 1,423 measures, including omnibus bills, were passed. In the Seventieth Congress (1927-29), a total of 1,722 were passed; in the Seventy-first, a total of 1,524.

measures can be introduced. Congressmen find it worth while to have their names in the newspapers (in their home districts, at all events) as the authors of bills. They are usually willing to introduce measures, however ill-considered and fantastic, at the request of persistent lobbyists or of interested groups of voters, especially among their constituents. Many bills wear "by request" labels, which mean that the members formally introducing them disclaim all responsibility for them; and it is not even necessary to disclose the outside sources of such offerings. The introduction of great numbers of bills falls in, too, with American proneness to expect to cure every ill by piling up legislation. A very large proportion of the measures introduced—at least nine-tenths of them—are special bills appropriating public money for pensions, post-offices and other public buildings, and river and harbor improvements, usually in the state or district of the member introducing the bill; and the multitude of measures encumbering the clerk's tables is accounted for to a larger extent by the pressure brought to bear on congressmen to secure practical benefits of this kind for their constituents than by any other factor in the situation, or by all others combined. Special bills, even though the majority do not pass, have been the source of endless waste and jobbery; too often they are speeded on their way, while measures of country-wide interest have to fight for their lives.<sup>1</sup> Of the large numbers of public bills introduced, the best one can say is that relatively few contain genuine possibilities of wise legislation, and that, fortunately, still fewer ever pass.<sup>2</sup>

Reference  
to com-  
mittee

All bills introduced, after being numbered and recorded by the clerk, are referred to standing committees.<sup>3</sup> Private bills are turned over automatically to the committee designated in each case by the introducer. Public bills are sorted out and assigned, according to the rules governing the subject, by the clerk. Sometimes, however, a bill is of such a nature that it might be referred with

<sup>1</sup> On the petty, but time-consuming, nature of much of the business that comes before Congress, see C. A. Beard, "Squirt-Gun Politics," *Harper's Mag.*, CLXI, 147-153 (July, 1930).

<sup>2</sup> "The true source," says an experienced member of the House of Representatives, speaking of the general run of bills introduced, "may usually be found in some administrative official, or in some organization, or in some constituent with a grievance, an ambition, or a hope. Congress is not to any material extent an originating body." R. Luce, *Congress—an Explanation*, 3.

<sup>3</sup> The procedure up to this point is on the principle that all bills are created free and equal. All start on the same footing. Once the race for enactment has begun, however, the vast majority—as will appear—are found to have been left at the post.

almost equal appropriateness to any one of two or more committees; and in this case, as indeed in all cases of doubt, and also in the case of all bills received from the Senate, the speaker decides what shall be done.<sup>1</sup> Sometimes a bill is divided among two or more committees. Occasionally, too, a bill, after being referred to one committee, is recalled and sent to a different one. In any event, a bill, after being referred, is printed and distributed to all House members.<sup>2</sup>

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Each of the important standing committees has a commodious room in one of the office buildings constructed for the members of the Senate and House, where a special library and ample stenographic service are provided. The two houses are commonly in session in the afternoon; hence, committees regularly meet in the forenoon, and no committee of the House, save that on rules, may, without special permission, hold meetings while the House is itself in session. Many committees have little or nothing to do. But some receive scores, even hundreds, of bills every session, or have unusually long and complicated measures to handle, and accordingly find themselves crowded for time. To expedite matters, they create sub-committees (usually of five members) to which particular measures or classes of measures are assigned, or even individual sections of the same measure if it is one of exceptional importance, for example, a tariff or currency bill. Like the committee as a whole, these sub-committees contain representatives of both parties, but with the majority party always in control.

Committee  
meetings

On receiving a bill, a committee has first to inform itself on the measure's contents and probable effects, and then to decide what to do with it. A prime requisite is, of course, information from which to judge whether legislation on the subject is needed, whether the present bill is calculated to meet the need, and what results and implications will follow if the bill is passed. Such information is, or may be, obtained in several ways. The members of the committee, availing themselves of the resources of the committee library, the Library of Congress (including the division of legislative reference), and departmental files, may study the measure at first hand, and, as a group, decide what action to take. Or the bill (or certain parts of it) may be specially studied by a sub-committee. Again, information may be obtained from the find-

Sources  
of infor-  
mation

<sup>1</sup> To avoid confusion, the process will be described with reference to the House, and only important differences of procedure in the Senate will be noted.

<sup>2</sup> Sections of presidential messages recommending legislation are similarly referred to the appropriate committees.

ings and recommendations of special committees or commissions of investigation authorized, or even appointed, by Congress to prepare the way for legislation on a given subject.<sup>1</sup> Or data may be derived from investigations made by executive officers of the government at the request of Congress. The principal mode, however, is the holding of hearings, at which almost any person having interests at stake, or having information or ideas to present, can appear, whether he is in favor of the bill or opposed to it. Frequently these hearings give the committee-room the semblance of a court chamber: paid attorneys argue for or against the bill under consideration, and interested persons give testimony, while the committee members listen and perhaps ask questions. On a great tariff bill, the hearings may extend over many weeks, the stenographic reports running into thousands of pages of print. Attendance of the general public is permitted, though not encouraged.

Notwithstanding a large amount of publicity in the earlier stages of its deliberations, the committee eventually goes into executive session and reaches its conclusions in private.<sup>2</sup> Any one of several results may follow. It may report the bill unchanged, which is, of course, tantamount to a recommendation of passage. Or it may strike out some sections, add others, or alter the phraseology, and report the measure in this amended form. Or it may frame a bill of its own and present it as an alternative. In all of these cases, the report is likely, although by no means certain, to lead to favorable action by the House, especially if the committee (or even the majority element, if the subject be of a partisan nature) has come to its decision by a unanimous vote. The committee

<sup>1</sup> Earlier examples include the Industrial Commission created in 1898, the Commission on Immigration in 1907, and the Industrial Relations Commission in 1913. As a rule, such commissions of inquiry have consisted of a given quota of senators, an equal number of members of the House of Representatives, and certain representatives of the general public appointed by the president. As has been noted, the president frequently takes the initiative in creating commissions, drawn from the general public, for the investigation of matters of social and economic import, and with a view to obtaining data useful in shaping both executive and legislative policy. See p. 310 above.

<sup>2</sup> It is considered a breach of good faith for members, in the course of subsequent debate, to disclose what went on in committee, even though they be sorely tempted to do so; and the votes taken in committee are never made a matter of public record. In the executive sessions of committees, writes an experienced member, falls "the most interesting, important, and useful part of the work of a congressman, and the part of which the public knows nothing. Indeed, the ignorance of the public about it is one of the causes of its usefulness. Behind closed doors nobody can talk to the galleries or the newspaper reporters. Buncombe is not worth while. Only sincerity counts." R. Luce, *Congress—an Explanation*, 12.

has, however, one other possible course of action: it may make no report at all, or, in other words, may "pigeon-hole" the bill; and this is the fate that befalls the greater part of the measures introduced.<sup>1</sup> The decision to make no report may come after, and as a result of, investigations and hearings. But, most frequently, a measure which does not strike the committee offhand as promising or important is simply ignored from the outset, and has not the remotest chance of ever occupying the time of the committee members, much less that of the House itself. Under a rule adopted in 1925, it is possible to "discharge" a committee which has had a given bill or resolution for as long as thirty days (*i.e.*, to require it to report within fifteen days), provided (a) a petition for such action has been signed by a majority of the House, (b) a motion to discharge has been seconded seven days later by a majority, and (c) after debate, a majority votes to discharge.<sup>2</sup> But this is a difficult procedure, rarely brought into play successfully; and even when carried out, it has no effect beyond putting the measure "on its appropriate calendar" for future consideration.<sup>3</sup> For all practical purposes, any bill can still be killed in its initial stage by simple failure of the committee having it in charge to report. Without, indeed, the rigorous sifting of bills accomplished in this way, the House would be hopelessly swamped with work, and it would become necessary to place severe restrictions upon the number of measures that members may introduce.<sup>4</sup> Occasionally, a committee fails to report a meritorious bill for the reason simply that the majority members are personally prejudiced against it. But most measures that come to their end because of failure to report deserve no better fate.

A reported bill goes back to the clerk of the House and is placed on one of the three "calendars," which means that it is before

The calendars

<sup>1</sup> Of all bills and resolutions introduced in the Sixty-sixth Congress, only 28 per cent got beyond the committee stage; in the Sixty-seventh Congress, 22 per cent; in the Sixty-eighth Congress, 36 per cent; and in the Sixty-ninth Congress, 45 per cent.

<sup>2</sup> Rule XXVII, Clause 4.

<sup>3</sup> P. D. Hasbrouck, *Party Government in the House of Representatives*, Chap. VIII. Occasionally a committee follows the plan, not of failing to report at all, but of reporting late, with the expectation that the measure will be caught in the final jam in either House or Senate.

<sup>4</sup> The system has its obvious advantages and disadvantages. It affords an easy method for presenting matters of real importance, and it saves time in the introduction of business; but it permits the bringing forward of all sorts of "half-baked measures and sensational bills, which are sometimes published widespread throughout the country, and excite unnecessary alarm among those who take them seriously and who would be especially affected by the proposed legislation." S. W. McCall, *The Business of Congress*, 46.



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the House for consideration at such time as it can be reached. If it is a revenue bill, a general appropriation bill, or a public bill directly or indirectly appropriating money or property, it goes on the Calendar of the Whole House on the State of the Union, commonly known as the Union Calendar. If it is a public bill not directly or indirectly appropriating money or property, it goes on the House Calendar. If it is a private, or "special," bill, it finds a place on the Calendar of the Committee of the Whole House, sometimes called the Private Calendar.<sup>1</sup> Theoretically, bills are called up in the order in which they appear on these calendars or lists; but in practice they are frequently, indeed usually, considered out of their turn.

Order of  
business in  
the House

For it must not be supposed that all bills that find their way to one of the calendars are actually taken up, debated, and voted on. With some two score standing committees—of which at least half are very active—reporting bills, the calendars soon grow congested, and only a small proportion of the measures listed can be given attention. The problem is to sift out the bills most deserving of consideration, and especially to ensure opportunity for the proper disposal of great and essential measures, such as the general appropriation bill of the year. This end has been attained through the development of an order of business which is regular, yet also flexible. The normal order of business for a day runs, according to the rules, as follows: (1) the speaker calls the House to order; (2) the chaplain offers prayer; (3) the journal of the previous day's proceedings is read and approved; (4) reference of public bills is corrected; (5) business "on the speaker's table," *i.e.*, presidential messages, bills with Senate amendments, and other matters which await the speaker's presentation to the House, is disposed of; (6) "unfinished" business, which is the business on which the House was engaged at the time of adjournment, is completed; (7) the "morning hour"—which, in point of fact, continues indefinitely until a motion brings it to an end—is devoted to the consideration of general bills called up from one of the calendars by committees which have reported favorably on them; (8) if time allows, the House goes into committee of the whole to discuss revenue or appropriation bills on the Union Calendar; or, if none such are pending, other public bills listed on the House Calendar.

<sup>1</sup> These calendars were established in their present form in 1880, although the first and third existed for some time before that date.

This sequence, however, is subject to interruption at almost any stage, and in a great variety of ways. In the first place, certain days are set aside for the consideration of particular kinds of measures, *e.g.*, the second and fourth Mondays of each month for business relating to the District of Columbia, and every Friday for bills on the Private Calendar. Again, at any time after the journal is read, it is in order, by direction of the appropriate committees, to move that the House go into the Committee of the Whole House on the State of the Union to consider revenue or general appropriation bills. Certain committees, too, have the privilege of reporting at any time, *e.g.*, those on ways and means, appropriations, elections, and rules, and—what is more important—securing immediate consideration for their reports. Bills introduced at the instigation of the president or of a department head, or for any other reason considered as administration measures, are often given right of way. Finally, by a two-thirds vote, the House can suspend the rules and depart as widely as it likes from the regular procedure, even to the extent of passing a measure through all stages at a single vote.<sup>1</sup> Under these circumstances, the process of legislation in the House has been aptly likened to the running of trains on a single-track railroad. "The freight gives way to a local passenger train, which sidetracks for an express, which in turn sidetracks for the limited, while all usually keep out of the way of a relief train. Meanwhile, when a train having the right of way passes, the delayed ones begin to move until again obliged to sidetrack."<sup>2</sup> The order of business—which represents a long development from simple days when there was time enough to handle practically everything that was brought forward—is useful as a general program or guide. But, in order to permit vital matters to be got at promptly and settled quickly, there must be accepted, and not very difficult, ways by which the regular order can be interrupted or suspended.

Mention has been made of the committee of the whole; and inasmuch as the sessions of this committee occupy the greater part of the time of the House, something more ought to be said about it. In reality, there are, as has appeared, two committees of the

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Departures  
from the  
regular  
order

Committee  
of the  
Whole

<sup>1</sup> Ordinarily, this two-thirds rule serves to protect the interests of the minority. It fails in this respect, however, when, as in the Congress elected in 1920 (the Sixty-seventh), one party has so large a majority that the rules can be suspended by vote of the members of that one party alone. This situation, of course, does not arise very often.

<sup>2</sup> D. S. Alexander, *History and Procedure of the House of Representatives*, 222.

whole: (1) the Committee of the Whole House, which considers private bills, and (2) the more important Committee of the Whole House on the State of the Union, which handles public bills for raising revenue and for appropriating money or property. Both are, of course, simply the House of Representatives sitting in a different guise. The House, on motion of a member, votes to resolve itself into committee of the whole for the consideration of private bills or of a designated public bill; the speaker yields the chair to a special chairman whom he designates; one hundred members constitute a quorum, instead of the majority required when the House is in regular session;<sup>1</sup> any measure, or matter, that has been referred to the committee may be taken up; debate proceeds, very informally, under a rule allowing only five minutes to each speaker at a time, unless with unanimous consent; there are no roll-calls, and divisions are taken only by a rising vote or by tellers; and when the consideration of a measure is completed, the committee votes to "rise," the speaker resumes the chair, the mace (the symbol of the speaker's authority) is restored to its place on the marble pedestal at the right of the chair, and the chairman of the committee reports the action taken, with any amendments that may have been recommended. The House must, of course, act affirmatively upon the committee's report in order to give it effect.

This device, the origins of which are traceable to the Stuart period of English history, has proved exceedingly useful. It enables all finance bills to be considered in committee, yet under such circumstances that every member of the House can have a voice in the proceedings. It permits great numbers of amendments to be presented, explained, and disposed of expeditiously. It prompts rapid-fire, critical debate which, as a rule, shows the House at its best. And the absence of recorded yeas and nays enables members to speak their sentiments without check or restraint such as published votes sometimes impose.<sup>2</sup>

The three  
readings

Under a rule which in substance dates from the first Congress, every bill or joint resolution, in order to be passed, must have three readings. The first reading is by title only. Speaking strictly, it

<sup>1</sup> The difficulty of holding a quorum, and the enormous amount of time taken up by roll-calls (estimated at a month to six weeks out of every two-year period) has led to the suggestion that fifty be made a quorum. It is of interest to note that even in the regular sittings of the British House of Commons—a body containing 615 members—forty is a quorum.

<sup>2</sup> D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. xiii.

is no longer a "reading" at all; for the requirement is deemed to be met by printing the title in the *Congressional Record* and the *Journal*. Then the bill goes to committee and, if reported back, is placed upon the calendar for a second reading, at a date agreed upon between the committee and the speaker and majority floor leader. The second reading—which takes place in committee of the whole, or, for bills not there considered, in the House itself—is an actual reading in full, with opportunity for the offering of amendments; and this is followed by a vote on the question, "Shall the bill be engrossed and read a third time?"<sup>1</sup> If this stage is passed successfully, the third reading takes place, by title only unless a member demands a reading in full. Then—after engrossment—and only then, comes the vote on the measure's final passage. If the result is favorable, the bill or resolution is ready to be sent to the Senate.

As a rule, debate takes place only on the question of ordering a bill to a third reading, although, if not cut off by the "previous question," it may be renewed on the question of final passage. When a measure reaches the stage at which it can be discussed on the floor, the chairman (or other designated representative) of the committee which has reported it favorably speaks in its behalf, being followed by a minority member of the committee if, as is usually the case, the report has not been unanimous. Other members of the committee speak alternately for and against the bill, and finally members of the House who do not belong to the committee are recognized—provided any time remains. A rule dating from 1841 forbids a member to speak for more than an hour, except with unanimous consent. Even so, debate would tend to be interminable, but for certain devices by which it can be brought to a close, chiefly (a) advance agreements—now very common—on the length of time it shall be allowed to run, and (b) a practice, borrowed in modified form from the British House of Commons, known as the "previous question." At any stage of the discussion, any member of the House may "move the previous question;" and if the motion carries, a quorum being present, debate is ended and a vote is forthwith taken on the question which has been under consideration, although if there has as yet been no debate

Closure

<sup>1</sup> The reading of bills by a reading clerk is another serious waste of precious time. The practice was long ago abandoned in the British Parliament, and has been discontinued in the most progressive of our state legislatures. Congress holds tenaciously to it, "with the result of throwing away nearly, if not quite, a month of every term in mere clerical enunciation."

at all, the speaker is required to allow a discussion lasting forty minutes.<sup>1</sup>

Formerly, opponents of pending bills employed all manner of expedients to kill time and prevent action. Dilatory motions were made; unnecessary roll-calls were forced; efforts were put forth to stop proceedings by leaving the House without a quorum; time-consuming amendments were offered; and as a result a great part of the time of the House was wasted. Rulings of strong speakers, backed up by specially devised House regulations, have considerably reduced the effects of these forms of obstruction. One such regulation, as we have seen, growing out of an historic action of Speaker Reed in 1890, stipulates that "no dilatory motion shall be entertained by the speaker."<sup>2</sup> Plenty of ways of slowing up business, however, remain—many of them relics of a procedure shaped in days when tasks were relatively simple, but now archaic and outgrown.

Upon conclusion of the consideration of a bill or resolution, or an amendment thereto, a vote is taken. In regular sittings of the House, four, and in committee of the whole three, modes of voting are used. The first, and most common, is a division by simple sound of voices, *i.e.*, a *viva voce* vote. If any member is dissatisfied with the announced result of this, he may demand a rising vote; whereupon the supporters of each side of the question are counted. Again, if one-fifth of a quorum demands it, a vote is taken by tellers: a teller is designated for each side; the two take their places in front of the speaker's desk; the members in favor of the measure pass between them and are counted, and then those opposed; and the result is declared by the tellers and announced by the chair. Or, finally, if one-fifth of those present demand it, the "yeas and nays" are ordered: the clerk calls the names of the members, who respond with "aye" or "no;" these individual votes are recorded; and the result is duly announced. The yeas and nays may be demanded before any one of the other methods has been employed, and, if ordered, are taken forthwith.<sup>3</sup> But it must be observed that

<sup>1</sup> For a full discussion of the use and effects of closure in the House, see L. Rogers, *The American Senate*, 117-161.

<sup>2</sup> See p. 437 above.

<sup>3</sup> When the question is one of passing a measure over a presidential veto, the constitution requires the yeas and nays to be taken and recorded (Art. I, § 7, cl. 2). A great deal of valuable time would be saved if an electrical-voting device—such as is employed successfully in the legislatures of Wisconsin, Iowa, and Texas—were installed for use on all ordinary occasions. A single roll-call in the House of Representatives consumes about forty-five minutes.

this form of voting is used only in regular sittings of the House, never in committee of the whole. Effort used to be made to compel all members present to vote, but this has been given up as impracticable.<sup>1</sup>

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After a bill is passed in the House, it is certified by the clerk and carried by him to the Senate chamber, where it is received by the presiding officer and referred to the appropriate committee. The procedure thereupon followed need not be described in detail; in most respects, it is similar to that already indicated as prevailing in the House. A bill—whether originating in the Senate itself or sent over from the other end of the Capitol—is, as has been said, referred to one of the standing committees; if regarded favorably, it is reported; if reported, it is placed on a calendar, from which it may be called up out of its turn; three readings must be passed, the second one, at which amendments are offered, being the critical test; members are put on record by the yeas and nays under the same conditions as in the lower house; and as a result the bill may be adopted as it stands, or adopted with amendments, or defeated.

Procedure  
in the  
Senate

There are, however, some important differences between Senate and House procedure. For one thing, not only revenue bills and bills involving a charge upon the treasury, but all bills, are considered in the Senate in committee of the whole, and without any change of presiding officer. In the second place, there is no privileged business in the Senate, so that the order of the calendar is followed automatically unless by unanimous consent or a majority vote otherwise.<sup>2</sup> More important still is the relative absence of restraint upon debate. There are no restrictions upon the length of speeches, except such as are occasionally agreed to in respect to a particular measure; nor any upon their number, except that a senator may not, without consent, speak more than twice on the same subject in a single day; and—save for (1) occasional resort to a “unanimous consent” procedure (under which the members agree to a general restriction of debate), and (2) the very infrequent use of a closure rule adopted in 1917—debate proceeds without limitation. This was not always true. In 1789, the Senate, like the House, started off employing the familiar “previous ques-

Differences  
between  
Senate and  
House pro-  
cedure

<sup>1</sup> The stages in the enactment of a bill by the House are set forth officially in L. Deschler, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States*, 70th Cong., 2nd Sess., House Doc. No. 629 (1929), 441-444.

<sup>2</sup> In practice, appropriation bills enjoy a certain priority.

tion"<sup>1</sup> as a means of restricting discussion. But the device was found relatively useless, and in 1806 it was dropped from the code of rules. Since that time, greater freedom of debate has prevailed in the Senate than in any other important legislative body in the world. The comparatively small number of members has made this possible; and it cannot be denied that such liberty has some very decided advantages. The knowledge that ordinarily debate will not be cut off as long as any member has anything to say stimulates discussion and encourages the consideration of measures from all angles. Minorities have opportunity to make themselves heard to an extent rarely possible in the House. And freedom of full and indefinitely prolonged discussion in the Senate operates as a wholesome check—particularly in view of the separation of powers upon which our system of government is based—upon the executive, and also upon tendencies to party autocracy.<sup>2</sup>

Obstruction  
in the  
Senate: fili-  
bustering

Unfortunately, liberty is sometimes abused. In the Senate, the commonest form of such abuse is boresome garrulity—wasting time by sheer talkativeness, as often as not on some subject entirely foreign to that supposedly under discussion. A clause from Jefferson's *Manual* still appears in the Senate rules to this effect: "No one is to speak impertinently, or beside the question, superfluously or tediously."<sup>3</sup> But empty seats on the floor and yawning spectators in the galleries bear testimony to the fact that this rule—the latter part of it, at all events—is frequently more honored in the breach than in the observance. More important, however, than this is the practice of deliberately taking advantage of unrestricted freedom of debate with a view, not to throwing light on the subject under discussion or to converting the opposition, but to delaying and perhaps preventing action. This procedure is, in general, known as filibustering; and while it was not unfamiliar in earlier times, it has been brought into play most spectacularly and successfully in the last forty years, and especially since about 1910. A filibuster may be organized and conducted by a group or *bloc* of members, or it may be carried on by a member single-handedly; and it may have as its object to defeat a measure by "talking it to death," to compel amendments to be added, or to force the

<sup>1</sup> See p. 465 above.

<sup>2</sup> "The Senate is the only American institution so organized and articulated as to exert any supervision over the executive, and this function would be impossible were the rules to provide for closure." L. Rogers, *The American Senate*, p. viii. The thesis here laid down is argued forcefully, and on the whole convincingly, throughout Professor Rogers' interesting book.

<sup>3</sup> *Rules and Manual of the United States Senate*, § xvii.

majority elements to agree to pass some other measure, perhaps quite unrelated, in which the filibusterers are interested.<sup>1</sup> Naturally, a filibuster will have the largest chances of success if launched near the end of a session, particularly the biennial short session, the date of whose termination is fixed and irrevocable. In fact, the records show that almost all famous filibusters have taken place in the last hectic days of short sessions; and when people urge revision of the political calendar so as to eliminate the short session, the curbing of filibustering is usually one of the main objects in view. Many historic filibusters have proved severe endurance tests—for the speakers (especially for one who is making a single-handed fight), if not for the hearers, who, in point of fact, can often be counted on the fingers of one hand. Senator Faulkner spoke continuously for thirteen hours on the force bill of 1890, Senator Allen for fourteen hours on the silver purchase bill of 1893, and Senator La Follette surpassed all records, in 1908, with an eighteen-hour speech on the Vreeland-Aldrich emergency currency bill, in the course of which he sat, part of the time, on the arm of his chair and at intervals refreshed himself by drinking a mixture of egg and milk.

The first notable filibuster took place in 1890. But though, as the practice grew, efforts were made to check it, no success was attained for more than a quarter of a century. Immediately preceding the close of the Sixty-fourth Congress on March 4, 1917, a small band of filibustering senators defeated a bill authorizing the arming of American merchant-ships, at a time when our difficulties with Germany were nearing a crisis, thereby creating a situation declared by President Wilson to be "unparalleled in the history of the country, perhaps in the history of any modern government." "In the immediate presence of a crisis," . . . the president went on to say, "the Congress has been unable to act either to safeguard the country or to vindicate the elementary rights of its citizens. More than five hundred of the five hundred and thirty-one members of the two houses were ready and anxious to act; the House of Representatives had acted, by an overwhelming majority; but the Senate was unable to act because a little group of eleven

The armed  
merchant-  
ships fili-  
buster

<sup>1</sup> Sometimes, too, a Senate filibuster is employed to put pressure on the House of Representatives; bills in which the House is interested, or which are vital to the carrying on of the government, are held up until the House consents to pass a measure which the Senate filibusterers want to see converted into law. Senator Heflin, of Alabama, engaged in such a filibuster near the end of the last session of the Sixty-seventh Congress (Feb.-March, 1923).



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senators had determined that it should not. . . . The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible. . . . The only remedy is that the rules of the Senate be so altered that it can act."<sup>1</sup>

Adoption  
of closure  
(1917)

Convoked in special session immediately after this occurrence, the Senate adopted, by the decisive vote of 76 to 3, a rule under which it is now possible, although not easy, to bring debate to an end. The process is as follows.<sup>2</sup> First, a petition to close the debate must be signed by one-sixth (sixteen) of the senators. On the second calendar day after this petition has been filed, the roll of senators is called on the question: "Is it the sense of the Senate that the debate shall be brought to a close?" If there is a two-thirds vote in the affirmative, the measure before the Senate becomes the "unfinished business" until disposed of, to the exclusion of all other business; and thereafter no senator is permitted to speak for more than one hour altogether on the measure itself, or on its amendments, or on motions relating thereto. Furthermore, no amendments may be presented, except by unanimous consent; no dilatory motions or amendments are in order; and all points of order are decided by the chair without debate.

Workings  
of closure  
in its  
present  
form

This is closure in rather a mild form; the two-day delay provided for gives the opposition a chance to mobilize its forces, and two-thirds is a high figure for the supporters of the effort to attain. In a period of almost ten years, the device was successfully invoked only twice, *i.e.*, in the debates on the Versailles treaty in 1919 and on adherence to the World Court in 1926. In the short session ending March 4, 1927, however, five petitions went to a vote, and two of them prevailed, closure accordingly being applied in the debates on the McFadden branch-banking bill and a bill establishing bureaus of customs and prohibition in the Treasury Department and placing prohibition agents in the classified civil service. Three years then passed before closure was again applied—in June, 1930, as a means of frustrating an anticipated filibuster against an appropriation for starting construction of the so-called Boulder Dam project. It is possibly true, as some people have assumed, that closure is on the road to becoming a commonplace of senatorial routine; it has been threatened or attempted in a number of cases

<sup>1</sup> *Amer. Yr. Book* (1917), 5.<sup>2</sup> *Senate Manual*, Rule XXII.

in which it has not actually been applied, as, for example, in the debate on the London Naval Treaty in the summer of 1930. But that the present form of it is not generally expected to prove very effective is evidenced by the demand heard in various quarters for new regulations on the subject. In his inaugural address, in 1925, Vice-President Dawes lectured the senators on the iniquity of attempting to conduct the public business under archaic rules that sometimes permit a single one of their number to defeat important legislation favored by an overwhelming majority, and urged that the rules be promptly and drastically revised.<sup>1</sup> As long as he was in office, he kept up a running fire on the subject, seconded by the efforts of many other persons and organizations. Even yet, however, the public shows only occasional interest, and no change is in sight.<sup>2</sup>

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Demand  
for a  
stronger  
rule

In addition to the objection, on general principles, that minorities ought not to be able to hold up the Senate's work, there is special reprobation of filibusters which frustrate the passage of appropriation bills and those which are aimed merely at compelling the Senate to tack on to a bill some more or less irrelevant provision in which the filibusterers happen to be interested. An illustration of the former is the colorful filibuster of February-March, 1927, which caused the failure of a deficiency bill and of a bill carrying appropriations for pensions, with much resulting embarrassment.<sup>3</sup> A notorious instance of the latter is a filibuster carried on in 1903 by Senator Tillman because a deficiency appropriation bill omitted an item paying his state a war claim. In this instance, the senator took the floor with a copy of *Childe Harold* and calmly announced to his fellow-members that unless they agreed to replace the item he would read this and other poems until the session ended. Weary-

<sup>1</sup> *Cong. Record*, 69th Cong., Spec. Sess. of Senate, Vol. LXVII, pp. 1-2.

<sup>2</sup> For a drastic rule on the subject proposed by Senator Underwood in 1925, see L. Rogers, *The American Senate*, 181-182. On yielding the gavel, on March 4, 1929, Mr. Dawes boldly remarked: "Alone of all the deliberative bodies of the world, the Senate of the United States, under its present rules, has parted with the power to allot its time to the consideration of the subjects before it in accordance with their relative importance. This defect in procedure is fundamental. I take back nothing."

<sup>3</sup> In his annual message of December 7, 1926, President Coolidge suggested that appropriations be made biennially (as they are in most states), instead of annually, thus freeing them from the menace of short-session filibustering. Claiming to be expressing the consensus of opinion in the House of Representatives, Chairman Madden, of the committee on appropriations, condemned the plan, on the ground that estimates could not be prepared so far ahead, and also that annual discussion of expenditures in committee and on the floor is essential to curbing administrative extravagance. *Cong. Record*, 69th Cong., 2nd Sess., Vol. LXVIII, pp. 82, 5860.

ing of ballads, the senators finally consented to restore the item.

Before turning from the subject, mention may be made of certain main arguments (in addition to considerations alluded to at an earlier point in this chapter) employed by those who would have the Senate go no farther than it has gone in placing restrictions on debate. The first is that by far the greater portion of the measures that have been killed by filibuster were not wanted by the country and were never revived, a good illustration being the ship subsidy bill sponsored by President Harding in 1922. A second is that the Senate, on the present basis, is able to get through with a very satisfactory proportion of the business presented to it, as is evidenced by the fact that in five recent Congresses the Senate passed one hundred and eighty-two more bills and resolutions than the House, even though the latter has full provision for closure and is rarely the scene of a filibuster. A third consideration is that the present oft-used device of "unanimous consent," by which the members unanimously agree in advance to limit speeches on a given measure after a certain day and to take a vote at a specified hour, serves all necessary purposes, being in truth itself a species of closure. If a fourth were to be added, it would perhaps be that, for the most part, the attitude of individual senators is determined by their personal interests (a member whose bill has been defeated by filibuster usually being, for a time, quite keen about abolishing the practice), and is often totally different in one set of circumstances from what it was when conditions were reversed.<sup>1</sup>

Disagree-  
ments be-  
tween the  
houses

A bill which passes both branches of Congress in identical form is sent to the president and becomes law if it receives his signature. The Senate may, however, amend a House bill, and the House may amend a Senate bill; and unless the first body forthwith accepts all of the amendments added by the second one—which will practically never happen in the case of an important measure—some means must be found of overcoming the disagreement. No bill can become law unless every part and feature of it has been concurred in at both ends of the Capitol. The means regularly employed to bring the houses into harmony is the appointment of a

<sup>1</sup> On the general subject of closure in the Senate, see L. Rogers, *The American Senate*, 161-190, and R. Luce, *Legislative Procedure*, 283-296; on closure in the short session of the Sixty-ninth Congress, *Amer. Polit. Sci. Rev.*, XXI, 300-308 (May, 1927). Cf. A. W. Dunn, "The Filibuster Defended," *Rev. of Revs.*, LXXII, 634-638 (Dec., 1925), and an article by Senator G. W. Norris in *New York Times*, March 13, 1927, § 8, p. 1.

conference committee; and statistics show that, on the average, one-tenth of all the bills and resolutions that pass through Congress—including almost all of the weightier ones, *e.g.*, on taxation, commerce, immigration, etc.—are referred to such a committee. Sometimes the initiative is taken by the house in which the measure originates, sometimes by the house making the first amendment to the measure after receiving it from the originating house, the latter, in this case, being asked for a conference before it has had any opportunity either to accept the amendments or to reject them. In any event, one house invites the other into conference,<sup>1</sup> the committee for the purpose being composed usually of three, but occasionally, for very important bills, of five, seven, or even nine, “managers” appointed from each house by the presiding officer thereof, and almost invariably including in each case the chairman, the next ranking majority member, and the ranking minority member of the committee having the bill in charge. The House frequently instructs its conferees; the Senate never does so, and is strongly opposed to the practice. In any case, the conference is always a “free” conference; that is to say, the managers—except in so far as instructed by the body which they represent—are at liberty to discuss all the issues in disagreement between the two houses and to use their judgment in settling them.<sup>2</sup> The meetings are held in the room of the Senate committee having jurisdiction of the bill.

The task before a conference committee may be easy or difficult. The house which last considered the measure in hand may have introduced but few, and not particularly controversial, amendments; and by simple process of give and take the conferees may speedily come to a report which the two houses can accept. On the other hand, scores, and even hundreds, of alterations may have been made, and indeed the whole of the bill following the enacting clause may have been stricken out in favor of a new bill. Even in revenue legislation—despite the constitutional provision that all bills for raising revenue shall originate in the House—the Senate sometimes goes this far, as for example, in considering the tax revision bill passed in 1921, when it wrote an entirely new measure in the form of eight hundred and thirty-three amendments to the House

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Work of  
conference  
committees

<sup>1</sup> The invitation may be, but very rarely is, refused.

<sup>2</sup> This is in contrast to the “simple” conference, formerly employed rather extensively in the British Parliament, in which the representatives of one house merely state the position of their house to the representatives of the other one, with no discussion or conference decision following. F. A. Ogg, *English Government and Politics*, 419-420.

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bill.<sup>1</sup> Sometimes a conference committee's work is soon over; sometimes weeks of hard labor are required. If no agreement can be reached, the bill fails—unless another joint committee is appointed and is more successful. But with rare exception a consensus is arrived at; and with almost equally rare exception the reported bill is accepted by both houses. There is no rule in either house requiring it, but it is a fixed principle of prevailing parliamentary law that a measure as it comes from conference is to be accepted or rejected *in toto*, *i.e.*, not piecemeal, and with no amendments. Ordinarily, the house which has offered the amendments recedes less than the one which originated the bill. Thus, in the case of the tax revision measure mentioned above, the Senate gave up only seven of its proposals, while the House entirely accepted seven hundred and sixty of them and accepted with qualifications sixty-six more.

Why  
specially  
important  
under our  
system of  
government

In Congress, as in the state legislatures, the conference committee is an exceedingly useful device. It is more necessary than in European countries (although it is by no means unknown there), because, in the first place, our national and state legislatures—unlike practically all European parliaments to-day—are organized on the plan of strict equality, legislatively, of the two houses, so that no bill or resolution can prevail unless definitely agreed to by both; and in the second place, because, whereas in cabinet-governed countries the ministers, who in a sense constitute a continuous conference committee of the two houses, are able to co-ordinate the houses' actions, our system of divided government tends to leave the legislative houses isolated and devoid of coördinating machinery except such as the houses themselves set up. The machinery which they employ is, of course, the conference committee; and it serves very effectively both in settling differences and in expediting procedure.

Short-  
comings of  
conference  
committee  
procedure

Some questionable features, however, appear. Almost without exception, conference committees work in secret. Doubtless it would be difficult for them to make headway if they followed a different course. Nevertheless, in view of the power which they wield, strong objection can be, and is, raised. For, while the committee is sup-

<sup>1</sup> Other instances come to mind. In 1883, the Senate struck out everything after the enacting clause in the tariff bill of that year and wrote its own measure, which the House was obliged to accept. It added eight hundred and forty-seven amendments to the Payne-Aldrich tariff bill of 1909, dictated the schedules of the emergency tariff act of 1921, and largely rewrote the permanent tariff act of 1922.

posed to deal only with actual differences between the houses, and to stay well within the bounds set by the extreme positions which the houses have taken, it often works into the measure, as reported, many features of its own, even going so far as to rewrite whole sections with the sole purpose of incorporating the views which the majority members happen to hold. Log-rolling enters in, as in the work of the two houses separately, and sometimes the compromises reached embody rather the worst than the best features of the two contending plans.<sup>1</sup> Conference committee reports are likely to reach the houses near the close of a session,<sup>2</sup> and, as has been said, are very likely to be adopted. There may be little time for critical scrutiny or debate; anything that the committee reports has a strong presumption in its favor; failure to act might seriously interfere with the operation of the government. In practice, this often means the adoption of important provisions, more or less surreptitiously added, without consideration by either house—in other words, legislation nominally by Congress but actually by conference committee.<sup>3</sup>

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When a bill has been passed in identical form by both houses, it is "enrolled," i.e., written or printed on parchment, and is thereupon signed by the presiding officers and sent to the president. If it is approved, or if it becomes law without presidential action, it is transmitted to the Department of State, to be deposited in the archives, and also to be duly published.<sup>4</sup> If it is vetoed, it goes back to the house in which it originated and becomes law only if, upon reconsideration, it is passed in both houses by a two-thirds majority.<sup>5</sup>

Final  
stages

On the ground that part of its work, e.g., the consideration of treaties, was of such a nature as to require secrecy, the Senate

Publicity  
of pro-  
ceedings

<sup>1</sup> There is the classic example of a tariff bill of several years ago in which the House imposed a duty of 25 cents a ton on coal, the Senate increased it to 50 cents, the House demanded a conference, and the duty emerged as 75 cents!

<sup>2</sup> Under the rules, they are highly privileged, especially in the House of Representatives, where they may be presented at any time when the journal is not being read or a vote taken.

<sup>3</sup> L. Rogers, "Conference Committee Legislation," *No. Amer. Rev.*, CCV, 300-307 (Mar., 1922); A. C. McCown, *The Congressional Conference Committee* (New York, 1927), especially Chap. I. It should be added that in 1917 the Senate adopted a rule providing that conferees should not insert in their report matter not committed to them by either house, nor strike from the bill matter agreed to by both houses; and in 1920 the House adopted a similar rule in respect to conference committees on appropriation bills. As is evidenced by recurring protests, however, both practices persist to some extent. Senator Norris's fight against the Muscle Shoals bill of 1925 affords a good illustration.

<sup>4</sup> G. Hunt, *The Department of State*, Chap. XI.

<sup>5</sup> See p. 303 above.

at first sat exclusively behind closed doors; indeed, even the House of Representatives occasionally barred the public. Strong objection, however, arose; and in 1793 the Senate adopted the wiser plan of opening its doors whenever engaged in ordinary legislative business and closing them only during "executive" sessions. The last secret session of the House was held not long afterwards, in 1811. On the theory that the Senate should be free to discuss treaties, presidential appointments, and sometimes other matters, without publicity being given to anything that was said, privacy for executive sessions was maintained unbrokenly for a hundred and forty years. That is to say, it was maintained as a matter of formal practice. Actually, enterprising press correspondents, in later years, found ways of ascertaining about everything that was said and done; and on this account, as well as because of growing criticism of the procedure—on general principles, and by senators themselves as well as by people outside—proposals became frequent that the rule of secrecy be rescinded, at least in so far as action on nominations was concerned.

The new  
Senate rule  
of 1929

The question was brought to the fore in a dramatic way in May, 1929, when, after the Senate had, by a narrow margin, confirmed an appointment of ex-Senator Irvine L. Lenroot to a judgeship on the court of customs appeals, a full statement of the senatorial vote appeared in newspapers throughout the country served by certain news agencies.<sup>1</sup> Loud protest was voiced in the Senate; an offending correspondent was grilled by the rules committee; proposals were heard that senators found guilty of giving out prohibited information be expelled; the rules committee suggested action under which representatives of all press associations were barred from the Senate floor; an informal poll showed that a substantial majority of members favored open doors for all sessions devoted to confirming appointments; sentiment for full publicity grew; and, after prolonged and heated debates, the Senate, on June 13, voted a new rule under which all business previously handled behind closed doors should thenceforth be considered in open session unless the house, in closed executive session, should decide otherwise by simple majority vote. The rule does not provide for publication of roll-calls in any closed session at which nominations by the president are considered; but it permits any

<sup>1</sup>Substantially the same thing had happened four months previously in connection with the vote to confirm the appointment of Mr. Roy O. West as secretary of the interior.

individual senator to make public the way he voted if he desires to do so. Only five senators stood out against any kind of a change. It is to be expected that from time to time a treaty will be held to require discussion behind "closed doors," but it is doubtful whether any presidential nomination will ever again be considered in that way. There are those who predict that the publicity now provided for will cause party lines to be drawn more sharply and political considerations in general to weigh more heavily in connection with confirmations; also that, by exposing nominees to vituperative attacks before the world, without opportunity to answer them, it will make more difficult the president's task of securing the services of men of the highest qualifications. Experience—even in connection with appointments to the Supreme Court—has, it must be admitted, tended to bear out such prophecies. In these respects, the change may not be for the better. But at all events, the adoption of the publicity rule, coupled with the introduction of closure in 1917, indicates that changes in a supposedly hide-bound senatorial procedure are, after all, not impossible.<sup>1</sup>

The constitution requires both houses to keep a journal and to publish it "from time to time."<sup>2</sup> The journals are, however, bare records of bills introduced, reports presented, and votes taken—that is, minutes of official actions, not records of debates. For a long time, debates in the House of Representatives were not reported, except in a haphazard way in some of the better newspapers; and Senate debates were practically not reported at all, although accounts of what went on in that body were frequently printed, as were isolated speeches.<sup>3</sup> In 1833, however, the *Congressional Globe*, giving the debates verbatim, was started as a private venture; and in 1873, the present *Congressional Record*, prepared by officers of Congress and printed by the government, was established. The *Record*, published daily during sessions, purports to give an exact stenographic account of everything that takes place on the floor of the two houses—save, of course, during closed sessions of the Senate. This it does not actually do, because mem-

Published  
records:

1. Pro-  
ceedings

<sup>1</sup> It may be noted that in March, 1930, the rules committee voted down a proposal that press correspondents be readmitted to the privileges of the Senate floor.

<sup>2</sup> Art. I, § 5, cl. 3.

<sup>3</sup> The collections entitled *Debates and Proceedings in Congress, 1789-1824* (42 vols., 1834-1856)—commonly cited as *Annals of Congress*—and *Register of Debates in Congress* (14 vols., 1825-1837) bring together these fugitive materials from newspaper, pamphlet, and other sources. There is, of course, nothing official about these publications, and the reports on which they are based are very incomplete and sometimes highly partisan.



bers sometimes edit their remarks in such a way as to make important changes in them, and because, in the case of the House, speeches are frequently printed, under special leave, which were never delivered by word of mouth at all. The Senate does not permit the latter practice, but it is quite as liberal as the House in allowing members to get into the *Record* magazine articles, documents, speeches of members on public occasions, and even large portions of books, which have not been read in debate.<sup>1</sup> In many cases, these extraneous materials, especially the House speeches, are designed to be sent out in quantities, under the government frank, for use in the member's campaign for reelection. This is one of the reasons why the *Congressional Record* has become so voluminous as to be practically useless to non-members, except, of course, for historical or research purposes. Anywhere from twelve to sixteen thousand of its generous double-columned pages are filled every biennium—enough matter, such as it is, to make up a library of a hundred ordinary volumes—and at a present cost to the treasury of more than forty dollars a page!

## 2. Laws

All measures, when the process of enactment is completed, are transmitted to the Department of State and printed by it in the form of "slip-laws," which are obtainable on application. At the close of each congressional session, the texts are collected, indexed, and published under the title of *Statutes of the United States*—commonly referred to as "pamphlet," or "session," laws. Finally, at the close of each Congress these session laws are consolidated into permanent volumes entitled *Statutes at Large of the United States*, and containing all acts and joint resolutions, public and private, and all concurrent resolutions, treaties, and presidential proclamations of the two-year period.<sup>2</sup>

Congress  
not hope-  
lessly  
inefficient

As a mechanism for legislation, Congress undeniably merits some of the criticism heaped upon it by political reformers, press, and foreign observers. It is far from perfection—far from even the capacity and efficiency that might conceivably be attained. The

<sup>1</sup> For example, a few years ago, a speech by Senator Bingham at the dedication of a new high-school building, and an effort by Senator Goff on "God, the Constitution, the Laws Thereunder, and Religion as Being the Underlying Basis of American Civilization"!

<sup>2</sup> The laws of the United States are to be found most conveniently in *Code of the Laws of the United States* (1926), and its supplements (Washington, Govt. Printing Office); and in *United States Code Annotated* (61 vols.) and *United States Code, Compact Edition* (one vol.), both issued by the West Publishing Co., St. Paul, Minn. Both of the last-mentioned editions are kept up to date by means of a pamphlet service.

haphazard and largely irresponsible selection of measures to be taken up, the minority-government possibilities inherent in the caucus, the vice of filibustering, undue adherence to the seniority rule in Senate and House committees, too frequent subordination of national to partisan and local interests and considerations—these and many other shortcomings suggest themselves to every reader of the foregoing pages. Nevertheless, it is to be borne in mind that much of the complaint which one hears springs from the disappointment or exasperation of people whose pet projects have been defeated or whose ideas have not proved to be those of the congressional majority. While one group rails at Congress because of legislation enacted in the interest of the farmers, a “farm bloc” insists that not enough has been done in this direction. The “wets” criticize a statute for the enforcement of the Eighteenth Amendment; the “drys” complain that the law is not sufficiently stringent. Do what it will, or do nothing at all, Congress is certain to encounter a chorus of disapproval. The fact is that, notwithstanding shocking wastage of time, a vast amount of careful and intelligent work is done on Capitol Hill, especially in the great committees, and that the houses somehow succeed in placing on the statute-book numerous measures representing honest attempts to promote the public well-being, and backed up by a great volume of favorable public sentiment. A stream does not rise higher than its source; by and large, Congress is no better, and no worse, than the people from which it springs.

It must be conceded that the business of lawmaking is carried on under serious handicaps, for some of which Congress is itself in no wise responsible. The very size of the country, and consequently of the membership of at least the lower house, is a limiting condition. The federal character of the government, entailing intricate problems of division of power, creates difficulties. For other drawbacks, the houses are somewhat to blame, but not entirely. Lack of leadership, sustained and dependable, yet free from dictatorial abuses—a situation more or less inevitable under our presidential form of government—is enervating and disheartening. The magnitude of the annual grist of business is an appalling obstacle which neither the new budget system nor any other presumed time-saving device has appreciably lessened.

Not that Congress often fails to pass measures in bewildering number and variety. Even before the World War, a single Congress (the Fifty-ninth) was able to turn out about seven hundred

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Handicaps

Bulk of  
legislation

public laws and over six thousand additional measures of a special, or private, nature; and the Sixty-seventh Congress, expiring March 4, 1923, was widely denounced as a "Do-Nothing Congress," notwithstanding that its output of public laws alone numbered nine hundred and thirty-one. The drawback of voluminous business consists in the hasty and otherwise inadequate consideration often given important measures, and the confusing of issues and general cluttering up of procedure by masses of minor proposals. Congress spends an astonishing proportion of its time on picayune matters, to say nothing of special legislation, which is by all odds the chief interest of many members. A main reason why the British House of Commons has a fair amount of time for debating important public measures, while the American House of Representatives does not, is that in the former all special, or "private," bills are handled by a procedure which requires hardly any of the time of the House as a whole.<sup>1</sup> It has been estimated that Congress devotes one-twelfth of its time, furthermore, to business ordinarily transacted by a city council—the business, that is to say, of the District of Columbia.

Scarcity  
of real de-  
bate in the  
House

Closely connected with this defect is the futility—and, consequently, the perfunctory character—of debate. In the Senate, there is real debate, which extends to principles and not mere details and technicalities; and, with the aid of the five-minute rule, the House, when sitting as committee of the whole, carries on animated interchange of information and opinion. The House, however, has practically ceased to debate large measures in a large way, through the medium of carefully prepared and exhaustive speeches.<sup>2</sup> The reason is that the fate of most important bills is predetermined by decisions and acts of the speaker, the rules committee, and especially the majority caucus. Bills reported from committees are explained briefly by the committee chairman, and perhaps other majority members, in an agreed order; and spokesmen of the minority are allowed a chance to present their views. But, with rare exceptions, no one expects votes to be changed by the arguments of either side. The general run of members have not studied the measure; they assume that the committee majority (or minority, as the case may be) has gone into the matter and knows what it is talking about; they hesitate to involve themselves in a discussion in which they might be worsted, and still more to incur sus-

<sup>1</sup> F. A. Ogg, *English Government and Politics*, 422-426.

<sup>2</sup> This statement may be qualified by the observation that sometimes there is real debate on finance bills.

picion of party irregularity or disloyalty; accordingly, they usually vote almost automatically to uphold their fellow partisans on the committee. Debate "assumes the character of shrewd fencing for position, of raising and combatting points of order, of explaining technical matters, rather than of a discussion of principles underlying a measure and their application to the facts under consideration."<sup>1</sup>

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Congress suffers from a dearth of interest in its work in quarters where such interest ought to be keen, and an excess of interest in other quarters where it is likely to have harmful effects. Considering that the two houses every year enact several hundreds of laws operative throughout the entire United States, and authorize the spending of from four to five billion dollars, and tax the people to raise these huge amounts, it might be expected that their doings from year to year, and almost from day to day, would command the attention of the general mass of citizens. That they fail to do so is not open to argument. Only when some exceptional fight over the rules, or some sensational investigation, or a filibuster, or a particularly tense debate is to be recorded, does the average small-town newspaper—on which most people are dependent for what they know about affairs at Washington—give much prominence to congressional proceedings. In other words, it is, as a rule, only the dramatic—not necessarily the really significant—developments that are brought to public attention. "This is due," says a public-minded editor, "on the one hand to sensational tendencies in journalism, and on the other to the fact that readers are superficial. In earlier periods newspapers were much more political in their character than at present. In those days, except for an occasional prize fight or horse race, there was no sporting news in the daily press. But nowadays the sport pages alone occupy more space regularly than the political affairs of the nation, state, and city, all put together. The financial and business pages are vastly more elaborate than political and governmental news. The theaters, and other so-called amusement interests, are also accorded more attention than the affairs of the country."<sup>2</sup> Many newspapers give more space by far to comic pictures that introduce the same characters in unending series than they give to all the doings of all governments, foreign and domestic. This is not remarked by way of

Lack of intelligent and sustained popular interest

<sup>1</sup> P. S. Reinsch, *American Legislatures and Legislative Methods*, 67.

<sup>2</sup> So likewise are crimes and scandals. The present full reporting of crime may, perhaps, be socially useful if it stirs authorities and public to remedial action.

finding fault with the newspapers. It is intended rather to help the reader understand how it happens that public opinion, in relation to the affairs of Congress, drifts so easily from indifference and neglect to impatience and disparagement."<sup>1</sup> As remarked above, a stream does not rise higher than its source; and if the people as a whole do not manifest a sustained, discriminating, but nevertheless appreciative, interest in what their representatives say and do at Washington, they have themselves to blame if things go wrong.

## The lobby

There are, of course, those whose interest is unflagging. But to a regrettable extent they turn out to be men and women with an ax to grind—persons who want a constitutional amendment proposed or killed, a statute passed, defeated, or amended, a favorable or an unfavorable committee report made, an appropriation voted, or some other benefit conferred; and another of the handicaps under which Congress works is the inescapable, and often improper, pressure brought to bear by these "lobbyists." It is to be noted that the lobby of which one so frequently hears in Washington—the "third house" of the paragraphs—consists, not so much of persons seeking favors directly for themselves, as of professional paid agents (sometimes ex-congressmen and ex-senators, who are presumed to know the right lines of approach) of great interests or organizations, whose business it is to haunt the legislative halls and members' offices and work unceasingly for whatever objects their clients have in view. Especially active in this way are the lobbyists of the Anti-Saloon League, the Chamber of Commerce of the United States, the American Farm Bureau Federation, the American Association of Railway Executives, the American Federation of Labor, the National Coal Association, the National Petroleum Association, the Standard Oil Company, the interests centered in the woollen, cotton, meat-packing, beet sugar, leather, and other great industries, and even the National Federation of Federal Employees and the National Education Association. Not all lobbying, be it noted, is reprehensible, either in object or in method.<sup>2</sup> There are lobbyists for the most worthy causes as for the least worthy; and their work may be entirely open and above-board, and may have a desirable

<sup>1</sup> Albert Shaw, in *Rev. of Revs.*, LXVII, 339 (Apr., 1923). Cf. J. Bryce, *Modern Democracies*, II, 62-66.

<sup>2</sup> There is, indeed, a recently organized "people's lobby," headed by Professor John Dewey, of Columbia University, and devoted to the defense of the public well-being at Washington by the use of influence designed to offset that of the lobbying "interests."

educational effect, just as it may follow devious courses, by dubious means, toward mercenary, or even corrupt, ends. The fact remains, however, that the footsteps of every congressman are dogged by men—increasing numbers of women too—whose flattering attention is aimed exclusively at influencing him by entreaty, promise, or threat, to vote for or against this or that particular bill, tariff schedule, subsidy, or privilege. A hundred and fifty organized groups maintain a total of six or seven hundred paid legislative agents of the kind at the capital; as many more are similarly represented from time to time when measures affecting their interests are under consideration.<sup>1</sup> Scarcely an important bill passes without complaint arising in some quarter that an importunate and lavishly paid lobby has had a hand in its enactment. "We have," says a well-known student of public affairs,<sup>2</sup> "two kinds of government—our political government . . . and a group of organized minorities . . . making a vast but tremendously powerful invisible government—the government of minorities." In point of fact, this so-called invisible government has of late risen to a rather high level of visibility.

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A majority of the states have more or less effective regulations on the subject, but Congress has thus far not seen fit to do much more than launch spasmodic investigations. Bills, it is true, appeared as early as 1907; disclosures by investigating committees of both houses in 1913 stirred considerable interest; and in 1928 a measure requiring lobbyists, on penalty of fine and imprisonment, to register and file their expenses with the secretary of the Senate and the clerk of the House passed the former body, but failed in the latter. Other bills and resolutions have been brought forward, but thus far no legislation has resulted, partly because of doubt as to its effectiveness (inspired to some extent by the experience of the states), partly because of the difficulty of prohibiting improper practices without also interfering with legitimate ones, and perhaps partly because of fear of congressmen that any law enacted might place an obstacle in the path of their own lobbying activities at some future time when they shall have gone out of office. The pub-

The problem of  
regulation

<sup>1</sup> One such "accelerator of public opinion" (as an earlier lobbyist euphemistically described himself) brought suit in 1929 against three shipbuilding establishments for \$257,655 for services as a propagandist, and boasted that as a result of his activities eight ten-thousand ton cruisers were at the moment under construction. Indeed, the collapse of the Coolidge naval disarmament conference at Geneva in 1927 has been attributed to the efforts of this extraordinary man (W. B. Shearer).

<sup>2</sup> Mr. William Allen White.

licity given the matter by several senatorial investigations has, however, served to some extent as a corrective.<sup>1</sup>

In the early days of our national history, the legislative center of gravity was plainly in the House of Representatives, as the makers of the constitution intended it to be. After 1825, however, the Senate grew into greatly increased importance, becoming, indeed, the main forum of legislative activity in the period that led up to secession and the Civil War. From about 1870, the House recovered ground, partly because of a natural reaction against the Senate's high claims to authority (especially in the domain of foreign relations), but mainly because of the increasing proportion of senators whose principal claim to distinction was wealth or cleverness in political manipulation. But again, noticeably after about 1905, the pendulum swung back, and to-day the Senate, if not in a clearly preponderant position, is at all events decidedly more powerful than a generation ago. An English student of the subject considers that it is even now "the only example in the world of a second chamber that is incontestably more powerful than the first;"<sup>2</sup> and an American scholar avers that the United States "may boast of the most powerful second chamber and the most ineffective lower chamber in the world."<sup>3</sup> Furthermore, notwithstanding momentary lapses of prestige, the Senate's importance—in legislation, in finance, in control of foreign and other policy—is generally agreed to be steadily mounting. Power may be more in evidence than glory or popularity. But in a few years—in

<sup>1</sup> See, for example, *Lobby Investigation; Hearings before Sub-Committee, 71st Cong., 2nd Sess., Pursuant to Sen. Res. 20* (Washington, Govt. Printing Office, 1930). The most important treatise on the subject is E. P. Herring, *Group Representation before Congress* (Baltimore, 1929). Another good study is E. B. Logan, "Lobbying," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXLIV, Supp. (July, 1929). P. H. Odegard, *Pressure Politics; the Story of the Anti-Saloon League* (New York, 1928), is an excellent account of an organization noted for its lobbyist activities. C. A. Beard, "Whom Does Congress Represent?" *Harper's Mag.*, CLX, 144-152 (Jan., 1930), is a keen analysis of underlying conditions and problems. Other useful discussions include W. B. Munro, *The Invisible Government* (New York, 1928), Chap. iv; J. K. Pollock, "The Regulation of Lobbying," *Amer. Polit. Sci. Rev.*, XXI, 335-341 (May, 1927); P. H. Odegard, "Lobbies and American Legislation," *Curr. Hist.*, XXXI, 690-697 (Jan., 1930); F. R. Kent, "The Great Lobby Hunt," *Scribner's Mag.*, LXXXVII, 500-506 (May, 1930); and "One of the Craft," "A Lobbyist Tells," *No. Amer. Rev.*, CCXXX, 462-469 (Oct., 1930). On lobbying in state legislatures, see Chap. XXXIII below.

<sup>2</sup> H. B. Lees-Smith, *Second Chambers in Theory and Practice* (London, 1923), 154. The Japanese House of Peers seems, however, to have been overlooked.

<sup>3</sup> L. Rogers, *The American Senate*, 6. The first part of the statement is true, the second part doubtful.

any year—people who are nowadays out of patience with the Senate may be equally critical of the House.

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The  
Senate's  
advantages  
over the  
House

In comparison with the House of Representatives, the Senate has certain distinct advantages. Its members are older,<sup>1</sup> have wider knowledge of public affairs, and, in particular, have greater legislative experience because of the longer term, more numerous re-elections, and the steady recruiting of vigorous members from the lower house. Its members, also, are, on the average, more important as party leaders than are the representatives. Its smaller membership gives men of talent a better chance to show their mettle and become known to the nation at large. Its lack of effective restraint upon debate enables any and all members to hold up legislation and appropriations in a manner quite impossible in the House save in the case of a few majority leaders. With rare exceptions, senators enjoy far more patronage than do representatives; and the Senate's special powers of confirming appointments and assenting to the ratification of treaties place in its hands weapons which can be employed formidably in other spheres. Furthermore, while it is still true, as Lord Bryce remarked many years ago, that neither branch of Congress attracts the best talent of the nation,<sup>2</sup> the upper house tends to draw the best talent that enters political life; so that the average in that branch is perceptibly better than in the other one, and is probably rising. Certainly the Senate to-day contains fewer men of wealth, and also fewer political bosses of the Hanna-Platt-Quay type, than a decade or two ago. Doubt has already been expressed as to whether this is to be attributed to the shift from legislative to popular election;<sup>3</sup> but whatever the reason, the fact remains. The Senate is also far less conservative than formerly; indeed it is, on the whole, but slightly more conservative than the House. And it is the only body which has shown any real desire to curb the abuses of lobbying. While sometimes swayed by partisan passion, and prone to "play politics," as is the House, the Senate contains a larger proportion of members whose speeches and votes show independence of spirit and judgment; and, while handi-

<sup>1</sup> Not notably so, however. The average age of representatives at the opening of the Seventieth Congress (December, 1927) was fifty-four; of senators, fifty-eight.

<sup>2</sup> *Modern Democracies*, II, 52. Lord Bryce's explanation of the reasons makes illuminating reading. In brief, they are: (1) the dullness of congressional duties; (2) the scant opportunities for attaining distinction; (3) the requirement of residence in the member's state or district; and (4) the exceptional opportunities which America offers for careers in other directions.

<sup>3</sup> See pp. 424-425 above.



capped by the propensity of mediocre members to stand stiffly on their rights under the rules and try the patience of the country with their obstinacy, it is composed, in at least as large degree as the House, of men who are able, industrious, fair-minded, sparing in speech, and anxious to get on with the public business.<sup>1</sup>

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<sup>1</sup> An interesting and suggestive characterization of Congress by a well-informed member of the House will be found in R. Luce, *Congress—an Explanation*, Chap. v. For an analysis of the personnel of the Seventy-first Congress (1929-31), see *Amer. Yr. Bk.* (1929), pp. 59-63.

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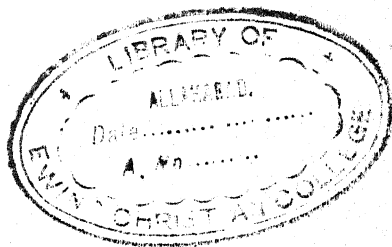
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XXII



## CHAPTER XXIII

### THE NATIONAL JUDICIARY <sup>1</sup>

Reasons for  
a system  
of national  
courts

The crowning defect of the government under the Articles of Confederation, wrote Alexander Hamilton in *The Federalist*,<sup>2</sup> was the absence of a national judiciary; and in providing for "a more perfect union" the framers of the constitution declared in the preamble their purpose to "establish justice," and made provision in the third article for a system of courts distinct from the state courts and deriving existence and jurisdiction solely from the national constitution and statutes. That separate national courts were not only appropriate but almost indispensable is manifest when one considers the federal nature of our system of government. The powers of the national government were delegated and enumerated in the constitution; but who should decide when any branch of that government had exceeded the limits set in the fundamental law? The inherent powers of the states were restricted, both by express grants of power to the national government and by express limitations placed upon the states; but, similarly, who should declare and enforce these constitutional limitations?

1. Enforcement of constitutional restrictions

There were three possible ways of dealing with disputes arising out of these matters. They might be left to be settled by the courts of the states involved in any given controversy, although, obviously, this would not ensure an impartial and disinterested decision. Or they might be submitted to the arbitration of states which were not concerned with the matters in controversy, after the manner of international arbitral tribunals; but this somewhat doubtful alternative was not given serious consideration. Or, again, they might be referred to courts belonging to the national government; and not only was this plan adopted, but long experience has fully established its wisdom. To be sure, in controversies between the

<sup>1</sup> The insertion of this chapter at the present point may seem an undesirable interruption of the treatment of the general subject of Congress. A clear understanding of the position of the courts in our governmental system is, however, essential to an intelligent study of the powers of Congress, to be dealt with in succeeding chapters.

<sup>2</sup> No. xxii. See J. C. B. Davis, "Federal Courts Prior to the Adoption of the Constitution," 131 U. S., Appendix, xi-lxiii (1888).

national government and a state over the bounds of their respective spheres of authority, it can hardly be maintained that the national courts constitute a completely impartial and disinterested tribunal. Looking back over the long history of adjudications in these courts, especially the Supreme Court, one can see a pronounced tendency, except during the period of Chief Justice Taney's influence shortly before the Civil War, to uphold the claims to power advanced by the national government, and to resolve most doubtful questions in favor of the national authorities. Unquestionably, there has been bias in favor of the national government as against the states; and in earlier times this was a source of complaint. As national unity, self-consciousness, and pride developed, however, the strong nationalistic propensities of the federal tribunals were regarded with growing approval; and the voices of dissent are not now numerous or strong.

The creation of independent national courts was justified, moreover, by other considerations. If to "establish justice" meant to ensure the security of rights under the national constitution, there must be a uniform system of law, uniformly administered as the "supreme law of the land." How could uniformity and supremacy of national law be secured if the interpretation and application of the constitution, treaties, and statutes of the United States were left to the courts of the several states? Under such an arrangement, there might be as many different final interpretations as there were courts. To assure any degree of uniformity, it was essential that there be a series of tribunals established and maintained by the same authority that makes the treaties and enacts the national laws. And in order that there be a really supreme law of the land, the final interpretation and enforcement of the national constitution, laws, and treaties must reside in one national court paramount to the other national courts and to the highest state courts. Inasmuch, too, as the control of foreign relations is vested exclusively in the national government, it was essential that any legal controversies concerning the status or rights of ambassadors and other representatives of foreign governments should be determined in courts established by the same authority which those governments would hold responsible for any violations of the law of nations, namely, the national government, rather than in courts deriving their authority from the state governments, with which foreign nations can have no direct dealings. Furthermore, in case the national government should itself become a party to a lawsuit

2. Maintenance of uniformity and supremacy of national laws

3. Jurisdiction in international and inter-state disputes

with its own citizens, it could hardly be expected to submit to the decisions of courts of an inferior state government. National courts, it was also thought, would provide more impartial tribunals than state courts for the decision of boundary disputes and other controversies between two or more states, and of controversies between the citizens of the same state claiming lands under grants of two or more states, or between citizens residing in different states.

For these various reasons, the makers of the constitution decided upon a national judiciary and put into the instrument a separate article—the third—dealing with the subject. The article is not lengthy. On such matters as the number, composition, and inter-relations of the national courts, the members of the convention were not of one mind; and, rather than jeopardize the larger aspects of the plan by haggling over details, they wisely left many things to be determined by Congress later on. So far as the structure of the judiciary was concerned, they provided simply that the national judicial power should be vested in one Supreme Court and in such inferior courts as Congress might from time to time “ordain and establish.” But they covered the essential points: they endowed the national government with judicial power; they fixed the principle of judicial tenure during good behavior; they ordained our present Supreme Court and opened the way for the establishment of such inferior courts as might be found necessary; they protected the rights of citizens by provisions concerning the conduct of trials; they defined the crime of treason; above all, they indicated, in language of marvelous conciseness and lucidity, what the range of the judicial power of the national government should be.

In order to see what sort of national judicial system has been developed on the basis of these few and simple provisions, we must first inquire into the last matter mentioned, *i.e.*, the scope of the national judicial power. This, of course, will involve some attention to the relations between the national courts and the state courts. Then we must note the organization and workings of the Supreme Court, and of the inferior courts with which Congress has filled out the system on its structural side. Finally, something must be said of the law administered in the courts, and of the relations of the judiciary to other branches of the national government.

The first fact to be noted about the scope of the federal judicial power is that the same principle holds here as elsewhere, namely, that the national government has only delegated, enumerated powers. As, applied to the judiciary, this means that the national

courts have jurisdiction over only those classes of cases specified in the constitution, while the state courts have jurisdiction over all others. The grant to the federal courts is made in the following language: "The judicial power [of the United States] shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party; to controversies between two or more states;—between a state and citizens of another state;<sup>1</sup>—between citizens of different states;—between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

A moment's contemplation of this article will show that the judicial power of the United States extends to some cases because of the nature of the matter in controversy, and to others because of the status or residence of the parties concerned. The first of these two classes of cases includes (1) all cases in law and equity arising under the constitution, laws, and treaties of the United States, and (2) all cases of admiralty and maritime jurisdiction. Whenever, in any lawsuit, a right is asserted which is based upon some provision of the national constitution, laws, or treaties, or when it is asserted that some right secured by the national constitution, statutes, or treaties has been violated by the enactment of a state law or municipal ordinance, the case may be commenced in, and decided by, the federal courts; or, if commenced in a state court, it may, before final decision, be removed to the federal courts. In other words, whenever it becomes essential to a correct decision of a lawsuit to obtain an interpretation or application of the national constitution, laws, or treaties, the case comes within "the judicial power of the United States." Cases of "admiralty and maritime jurisdiction," also placed within the federal judicial power, have to do with offenses committed on shipboard, and with contracts which by their nature must be executed partly or wholly on the high seas or "navigable waters of the United States," *e.g.*, contracts for the transportation of passengers and freight, marine insurance policies, contracts for ships' supplies and seamen's wages, and actions to recover damages for torts and other injuries. In time of war, prize cases are also included.

Federal  
jurisdiction

1. On  
ground of  
subject-  
matter

<sup>1</sup> See p. 492, n. 1, below.

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2. On  
ground of  
the nature  
of the  
parties

The second general class of cases comes within the scope of the federal judicial power because of the character or residence of the parties, and comprises (1) all cases affecting ambassadors and other public ministers and consuls; (2) controversies to which the United States is a party; (3) controversies between citizens of different states; (4) disputes between citizens of the same state claiming lands under grants from different states; and (5) cases to which a state is a party. From this last class, however, have been excepted suits brought against a state by the citizens of another state or by the citizens of another country. Such cases, if triable at all, fall exclusively within the jurisdiction of the state courts, and cannot be commenced or prosecuted in the federal courts.<sup>1</sup>

Exclusive  
or concur-  
rent juris-  
diction?

It should be noted, however, that from the mere fact that certain classes of cases are specifically mentioned in the constitution as falling within the judicial power of the United States, it does not follow that they are thereby wholly removed from the jurisdiction of the state courts. The constitution itself gives the federal courts no *exclusive* jurisdiction of any matters whatever; for anything that appears in that instrument, the state courts may exercise jurisdiction concurrently with the federal courts over any or all of the cases mentioned. Congress alone determines by law which of these cases shall be handled exclusively by the federal courts; all others may be tried in state courts.<sup>2</sup> Under present national statutes, the federal courts have *exclusive* jurisdiction of all civil actions in which a state is a party, except those between a state and its citizens or between a state and citizens of another state or aliens; also of the following cases, arising under either the constitution or national statutes: crimes, penalties, and seizures, and all admiralty, maritime, patent-right, copyright, and bankruptcy cases; and, still

<sup>1</sup> No state in the Union may be sued, even in its own courts, without its consent. In the case of *Chisholm v. Georgia* in 1793 (2 Dallas 419), the Supreme Court sustained an action brought against the state of Georgia by a citizen of South Carolina. This was generally regarded as derogatory to the dignity of a sovereign state, and it led to the immediate adoption of the Eleventh Amendment, which excepts from the jurisdiction of federal courts cases brought against a state by citizens of another state or of a foreign state. This incident has sometimes been referred to as the earliest instance of a "recall of a judicial decision." On the suability of a state, see W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), III, Chap. LXVII.

<sup>2</sup> The laws governing the jurisdiction and procedure of the courts of the United States form what is called the federal judicial code, and may be found in *U. S. Compiled Statutes* (1918), pp. 124-224; *ibid.* (1923), pp. 49-61; *Code of the Laws of the U. S.* (1926), pp. 863-947.

further, of all suits and proceedings against ambassadors, or other public ministers, or their domestics, and against consuls or vice-consuls.<sup>1</sup> Concurrent jurisdiction is enjoyed by the federal and state courts over practically all other cases falling within the judicial power of the United States.<sup>2</sup> This means that the party instituting such a case (the plaintiff) has the option of commencing his action in a court of the state where he or the defendant resides, or of bringing it in a federal court.

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In criminal cases, it may happen that the same offense is punishable by the state authorities in the state courts and by the federal authorities in the federal courts. This is true, for example, in cases of fraud, if use has been made of the mails. Similarly, if a package is stolen from a freight-car moving in interstate commerce, the theft is a crime punishable under both state law and national law. And the fact that a person has been successfully prosecuted for such an offense in a state court is no bar to his prosecution and conviction in the federal courts. In such an event, the defendant is being tried in different jurisdictions for offenses against different sovereignties.<sup>3</sup>

The actual appearance of cases upon the dockets of various federal courts may be accounted for in one or another of three ways. Most numerous are the cases over which the federal courts have been given exclusive jurisdiction; and these are, of course, begun and ended in that forum. The least numerous are the cases which might have been commenced in either a state or a federal court, at the option of the plaintiff, but have actually been commenced in a state court and thereafter have been transferred, at the request of the defendant, to a federal court to be finally disposed of there. Such removal is permissible when either one of two facts can be shown to exist, namely, that the parties reside in different states; or, if they reside in the same state, that a right or immunity is called in question which is based upon the national constitution, laws, or treaties. In the first instance, the case is said to have been

How cases  
get into  
the federal  
courts:

1. Original  
jurisdiction

2. Removal  
from state  
courts

<sup>1</sup> *Code of the Laws of the U. S.* (1926), pp. 907-908.

<sup>2</sup> In a few instances, Congress has left jurisdiction wholly to the state courts; e.g., suits between citizens of different states where no federal question is involved and the amount in controversy is less than \$3,000. These cases may not be brought into the federal courts at all, either originally, by removal, or by appeal. J. P. Hall, *Constitutional Law*, 354. Cf. F. Frankfurter, "Distribution of Judicial Power between the United States and State Courts," *Cornell Law Quar.*, XIII, 499-530 (June, 1929).

<sup>3</sup> The punishment of the same offense by both the federal and state governments is sometimes mistakenly spoken of as violating the "double jeopardy" provision of the Fifth Amendment. On double jeopardy, see C. K. Burdick, *The Law of the American Constitution*, 395-399.



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from state  
courtsKinds of  
law admin-  
istered1. Crim-  
inal lawStatutory  
crimes

removed by reason of the "diverse citizenship" of the parties; in the second, removal has taken place because a "federal question" is involved; in either event, the removal must take place before the state courts have entered final judgment.<sup>1</sup> Such removal cases, almost without exception, go directly to an inferior federal court, rather than to the Supreme Court; although they may ultimately reach that tribunal if an appeal is taken from the decision of the lower court. Removals of this sort are permitted in order to place the defendant on an equal footing with the plaintiff, who had the choice between the federal and state courts when he brought his suit; and also in order to protect the defendant from the danger of local prejudice. Finally, cases get into the federal courts as the result of appeals from the decisions of the highest court in the state where the action originated. Whenever it becomes necessary for such a state court, in deciding a case, to uphold or deny any right claimed under the national constitution, laws, or treaties, the defeated party may take an appeal, not to an inferior federal court, but directly to the Supreme Court; and there the rights asserted on the one side and denied on the other receive final adjudication.

From the point of view of the kinds of law which the federal courts are called upon to administer, the cases which come before them in one or another of the foregoing ways fall into two great divisions, criminal and civil. The only criminal jurisdiction belonging to the federal courts is such as has been conferred by act of Congress; and Congress, of course, has no authority to define crimes and fix penalties except as it is derived, directly or indirectly, from the constitution. In only five kinds of cases has that instrument directly conferred this authority, namely, (1) piracies and felonies committed on the high seas; (2) offenses against the law of nations, or international law; (3) counterfeiting the securities and current coin of the United States; (4) treason against the United States; and (5) offenses committed in the District of Columbia, in all places wholly under national control, such as forts and arsenals, and in the territories and dependencies, where Congress has ample authority to define crimes and determine their punishments.<sup>2</sup>

If, however, the criminal dockets of the federal courts comprised only cases falling within these five classes, the criminal jurisdiction of these tribunals would be quite unimpressive. Actually,

<sup>1</sup> J. C. Rose, *Jurisdiction and Procedure of the Federal Courts* (2nd ed., 1922), Chaps. VIII, IX, XIII.

<sup>2</sup> The federal criminal code will be found in *Code of the Laws of the U. S.* (1926), pp. 459-521.

the power of Congress to define crimes and provide for their punishment is very much greater than the above enumeration would indicate; for, whenever Congress has authority under the constitution to pass a law upon a given subject, it has the implied, or resulting, power to make that law effective by providing that infractions thereof shall be treated and punished as crimes. The power to establish post-offices, for example, carries with it the implied power to punish the crime of robbing the mails. The most numerous class of criminal offenses now before the federal courts has arisen from violations of laws passed to enforce the prohibition amendment to the constitution.<sup>1</sup> Cases of this sort greatly outnumber all other federal offenses put together, and they have so enormously added to the criminal work of the courts as to necessitate the creation of about thirty new district judgeships since 1922.<sup>2</sup>

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Procedure in federal criminal cases<sup>3</sup> is regulated in a large measure by those provisions of the early amendments which are designed to protect the rights of persons accused of crimes by surrounding them with the safeguards against arbitrary and irregular prosecutions originally embodied in the English Bill of Rights of 1689. No civilian, for example, may be put on trial for a federal offense (except a misdemeanor) unless he has been indicted by a grand jury, nor be compelled to testify against himself in any criminal case, nor be deprived of life, liberty, or property without due process of law. Persons accused of crimes are entitled to a speedy and public trial by an impartial jury;<sup>4</sup> to a trial in the vicinity where the crime was committed, in order to facilitate the obtaining of witnesses; to be furnished with an exact copy of the indictment; to have witnesses subjected to cross-examination in their presence; to have compulsory process for obtaining witnesses; to have the assistance of counsel for their defense; and to be admitted to bail in a reasonable sum, pending their trial. Furthermore, no person may be twice subjected to trial in a federal court

Criminal  
procedure

<sup>1</sup> Of the 35,849 criminal cases pending in the federal courts June 30, 1930, 22,671 were cases under the National Prohibition Act. Report of the Federal Judicial Conference (1930), in *U. S. Daily*, Oct. 6, 1930, p. 2401; *Annual Report of the Attorney-General* (1930), 4-8.

<sup>2</sup> *U. S. Compiled Statutes* (1923), pp. 49-50.

<sup>3</sup> See Rose, *op. cit.*, Chap. iv. The only provision in the constitution's "bill of rights" relating to civil procedure is Art. VII, which guarantees a trial by jury in all civil cases in which the amount in controversy exceeds twenty dollars.

<sup>4</sup> The right to trial by jury does not extend to petty offenses, and may be waived, under certain circumstances, even in felony cases. See *Schick v. U. S.*, 195 U. S. 65 (1904); *Low v. U. S.*, 169 Fed. Rep. 86 (1909); *Patton v. U. S.*, 281 U. S. 276 (1930).

for the same offense if he has once been acquitted on the charge. Criminal prosecutions are instituted and their trials are conducted, on behalf of the government, by district attorneys appointed by the president upon recommendation of the attorney-general, for each of the eighty-four districts into which the states are divided. In exceptionally important and complicated cases, a special district attorney is appointed to represent the government; and the territories have their district attorneys serving in a similar capacity.

2. Civil  
law(a) Cases  
at law

Far outnumbering the criminal cases are the civil cases, which constitute the second great division of actions tried in the federal courts. On the basis of the law administered, three distinct sorts of civil cases must be distinguished—cases at law, cases in equity, and admiralty cases. Cases at law comprise mainly actions arising out of civil wrongs, called torts, and actions based upon contracts, either express or implied. They rest upon some principle of the old common law of England, or upon some state or federal statute; and they are tried in accordance with the rules of the English common law, or modifications thereof provided for by state<sup>1</sup> or federal statutes. In most actions at law, the redress sought is money damages, and the remedy is granted only after the wrong has been committed or the contract has been broken. At common law, such actions could be brought into the courts only when they could be fitted into some one of about a half-dozen stereotyped and rigid forms of action, such as *assumpsit*, *trover*, *trespass*, *replevin*, etc. But cases were constantly arising, as they do nowadays, in which substantial justice, or equity, could not be obtained under any of these common-law actions, or even by the award of money damages. There are many cases, for example, in which the granting of money damages to the injured party is an inadequate remedy, by reason of the fact that the defendant may refuse to pay the judgment obtained against him and has no property which can be seized and sold to satisfy the judgment. Or it may happen that, owing to the nature of the contract upon which the action is based, it is impossible to estimate the amount of damages which would result from a non-fulfilment of the agreement. In still other cases, a contract may be involved—for example, a deed conveying title to real

<sup>1</sup> In the decision of many cases based upon diverse citizenship of the parties, the courts are not called upon to interpret or apply any phase of national law, but merely state laws. For example, if a suit is brought between citizens of New York and Pennsylvania regarding land in Pennsylvania, the only law involved in the case and applied by the federal court is the local law of Pennsylvania. See J. P. Hall, *Constitutional Law*, 361-364.

estate—which is perfectly regular and legal on its face and is executed with due formality, but the circumstances surrounding its execution may have been tainted by fraud, intimidation, or undue influence.

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With a view to supplementing the usual common-law remedies and doing “substantial justice,” in such cases as these, by disregarding the inflexible “forms of action,” the equity jurisdiction of English and American courts has been built up through the centuries. How equity proceedings accomplish this object will be easily understood if we follow out each of the illustrations given above. Labor strikes often result in injury or destruction of property for which no adequate money damages can be collected. In equity proceedings, a federal court may, by issuing a writ of injunction,<sup>1</sup> command the strikers and their sympathizers to refrain from injuring or destroying property belonging to the employer. Any violation of the terms of an injunction constitutes an offense known as contempt of court, which may be punished severely and summarily by the court whose injunction has been disregarded, in most cases without benefit of jury trial for the offending parties.<sup>2</sup> In this fact, and in the additional aspect that injunctions may be issued in advance of any actual injury or destruction, as a means of *preventive* justice, lies the superiority of equity proceedings in such cases over the only alternative at common law, namely, an action for damages after property has been injured or destroyed.

(b) Cases  
in equity

In the second example given above, it is impossible to estimate the amount of damages that might result from a breach of contract, as when the owner of a valuable race-horse has agreed to sell that horse—the only one the purchaser wants. If this contract is broken, a court, in equity proceedings, will, by a decree of specific performance, order the owner to carry out the agreement. Failure to do so thereafter will subject the owner to contempt proceedings. In the third class of cases in which the common law furnishes no

<sup>1</sup> An injunction is a writ issued by a court commanding an individual, a group of persons, or a corporation to do, or to refrain from doing, certain acts described in the writ. The writ is of very early English origin, and the right to issue it is not peculiar to the federal courts, but belongs to the state courts as well. Injunctions have been employed so frequently in recent years in labor disputes that labor leaders have been loud in their denunciation of what they call “government by injunction.” See A. C. McLaughlin and A. B. Hart, *Cyclo. of Amer. Govt.*, II, 179-181.

<sup>2</sup> The Clayton anti-trust law of 1914 provided for trial by jury in cases of *indirect* contempt arising out of labor disputes, that is, for acts done outside the presence of the court and not interfering with the performance of judicial functions. This was upheld by the Supreme Court in *Michaelson v. United States*, 263 U. S. 698 (1923); 45 Sup. Ct. Rep. 10 (1924).

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adequate remedy, a court in equity proceedings may entirely set aside a deed for the transfer of property if it is shown to the satisfaction of the court that the circumstances surrounding the execution of the deed were tainted by fraud, duress, or the exercise of undue influence.

No separate  
equity  
courts

The rules and remedies peculiar to equity practice and procedure are enforced by the same federal judges who administer the principles and rules of the common law; and it is always necessary in equity proceedings, before a judge will grant the appropriate equity relief, to establish the fact that the party seeking equity has no adequate remedy at law. In its long history in England and in this country, equity has come to have its own elaborate and highly technical code of rules and precedents parallel to the complicated rules and procedure in common-law actions. Such equity rules as are observed and enforced in our federal courts are drawn up, and at extended intervals revised, by the judges of the Supreme Court.

(c) Admiralty cases

Not only do the same federal judges administer common law and equity, but they also administer admiralty and maritime law in cases of tort and contract connected with shipping and water-borne commerce on the high seas or "navigable waters of the United States." Such cases are tried and determined in accordance with the highly technical and peculiar rules of the admiralty code inherited from England and modified by acts of Congress. In prize and piracy cases, the judges sitting in admiralty courts also administer international law.<sup>1</sup>

Structure of  
the federal  
judicial  
system

Having seen the scope of the national judicial power, something of the relations between the national courts and the state courts, the different ways in which cases get into the federal courts, and the kinds of law which federal judges are called upon to administer, we are in a position to take up the actual structure or organization of the courts comprised in the federal judicial system. Only one such court, the Supreme Court, is definitely provided for in the constitution; all of the others have been created, and their jurisdiction has been determined, by acts of Congress passed at various times beginning with the Judiciary Act of 1789, which forms the basis of the present organization.<sup>2</sup>

<sup>1</sup> W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), III, Chap. LXXIV.

<sup>2</sup> C. Warren, "New Light on the History of the Federal Judiciary Act of 1789," *Harvard Law Rev.*, XXXVII, 49-132 (Nov., 1923).

First, in logical order, come the courts of first instance, called district courts, of which there are, in the states, eighty-four.<sup>1</sup> A small state, such as Vermont or New Hampshire, may constitute a district by itself; larger or more populous states may be divided into two or more districts; and in still other cases, a district may consist of parts of two or more states. In every district there is at least one district judge, appointed by the president and Senate on recommendation of the attorney-general.<sup>2</sup> In the more populous districts, there may be four, or even eight, district judges, the number depending upon the amount of litigation. Where there is more than one such judge, the district court holds its sessions in different "divisions" simultaneously, each division being presided over by a single judge. In all, there are (1931) one hundred and forty-eight district judges.<sup>3</sup>

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1. District  
courts

The variety of cases that may be brought in the district court is so great that only a few of the more important can be mentioned here. All federal crimes are prosecuted in these tribunals, including prosecutions under the anti-trust laws.<sup>4</sup> Over claims against the United States involving less than \$10,000, the district court has concurrent jurisdiction with the Court of Claims.<sup>5</sup> Admiralty cases, suits arising under the internal revenue, postal, copyright, patent, and bankruptcy laws, or under any law regulating commerce, and likewise cases removed to a federal court from a state court before final judgment, are triable in the district courts. In a few cases, appeals may be taken directly to the Supreme Court; but in cases where the jurisdiction of the district court is questioned, and whenever the constitutionality of a federal or state law is involved, appeals first go to the circuit court of appeals. The district court

Their  
jurisdiction

<sup>1</sup> There is also a district court in Alaska, Hawaii, Porto Rico, and the Canal Zone. *Register of the Department of Justice and the Courts of the United States* (35th ed., 1930), 18 ff.

<sup>2</sup> K. C. Sears, "The Appointment of Federal District Judges," *Ill. Law. Rev.*, XXV, 54-75 (May, 1930).

<sup>3</sup> The salary of a district judge is \$10,000.

<sup>4</sup> During the first half-century under the constitution, the state courts had concurrent jurisdiction over federal crimes. C. Warren, "Federal Criminal Law and the State Courts," *Harvard Law Rev.*, XXXVIII, 545-598 (Mar., 1925). To meet the recent increase in the number of criminal cases, it has been strongly urged that new federal "police courts" be created for the trial of petty offenders and misdemeanors without indictment and without a jury. See address of E. B. Buckner, U. S. district attorney for the Southern District of New York, in *New York Times*, June 5, 1925; F. Frankfurter and T. G. Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury," *Harvard Law Rev.*, XXXIX, 917-1019 (June, 1926); R. W. Moore, "Relieving the United States District Courts," *Va. Law Rev.*, XIII, 269-277 (Feb., 1927).

<sup>5</sup> *Code of the Laws of the U. S.* (1926), pp. 867-868.

itself has no appellate jurisdiction whatsoever; the common impression that cases may be appealed from the highest state courts to the federal district court is quite erroneous. Cases, however, are frequently removed to the district court from state courts before final decision there, when the parties are citizens of different states or some "federal question" is involved.<sup>1</sup>

Next in order come the circuit courts of appeals, one of which is found in each of the ten great judicial circuits into which the country has been divided. The judges who hold these courts are usually circuit judges, although district judges may be called in to serve.<sup>2</sup> The justices of the Supreme Court also have a right to sit with the court of appeals of their respective circuits, although they seldom find time to do so. All circuit judges are appointed by the president, subject to confirmation by the Senate, and hold office during good behavior. In circuits having the largest amount of litigation or greatest area, there are six circuit judges; in other circuits, three or two. In any case, two judges constitute a quorum. If the judges are equally divided, the case may be certified to the Supreme Court for instructions or for final decision. As one might infer from its title, the circuit court of appeals has no original jurisdiction; its work is confined wholly to cases appealed from the district courts and to the review and enforcement of certain classes of orders issued by the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Reserve Board. Its decision is final in suits between aliens and citizens, between citizens of different states where no federal question is involved, and in cases arising under the criminal, patent, copyright, bankruptcy, and revenue laws, or the law of admiralty (except prize cases), when the amount in controversy does not exceed one thousand dollars.<sup>3</sup> Nevertheless, in any of these instances the Supreme Court may, upon the petition of either party, and before final decision, order the case transferred to itself for review and final decision. The original purpose in the creation of the circuit courts of appeals was to relieve the Supreme Court of some of its

<sup>1</sup> *Code of the Laws of the U. S.* (1926), pp. 870-873, 2025-2031.

<sup>2</sup> The salary of a circuit judge is \$12,500. At the present time (1931) there are forty-two circuit judges.

<sup>3</sup> *Code of the Laws of the U. S.* (1926), pp. 895-896, 2031-2032; M. T. Manton, "Organization and Work of the United States Circuit Court of Appeals," *Amer. Bar. Assoc. Jour.*, XII, 41-46 (Jan., 1926). The jurisdiction of the circuit courts of appeals was considerably enlarged by act of Congress in 1925. A chart showing the appellate relationship of the federal courts will be found in *U. S. Daily*, Sept. 29, 1926, and Oct. 24, 1930, p. 2592.

appellate jurisdiction, and thus to expedite the final adjudication of large classes of cases.

Until 1922, the district courts, and likewise the circuit courts of appeals, were virtually independent units, without a supervising or unifying head. When work grew excessive in one district or circuit, the usual remedy was for Congress to create a new judgeship or two, although there might be a dozen judges in other districts or circuits with comparatively little to do. Even so, the creation of judgeships did not keep pace with the growth of judicial business, so that in 1921 the federal courts were over 120,000 cases in arrears. In the following year, however, Congress passed an important act opening the way for the long-needed unification and equalization of court work.<sup>1</sup> Under this law, the chief justice of the Supreme Court becomes a real supervising and directing head for the whole federal judicial system. He is required to summon annually, and to preside over, a judicial council made up of the senior circuit judges of the ten circuits. It is made the duty of this council to advise as to the needs of the courts in their respective circuits, and as to improvement of the administration of justice generally. The law further requires every district judge to file an annual report setting forth the condition of business in his district, including the number and character of cases on the docket, the business in arrears, the cases disposed of, and recommendations for judicial assistance needed for the disposal of business during the ensuing year. On the basis of these reports, the council is required to make "a comprehensive survey of business in the courts . . . and prepare plans for assignment and transfer of judges to or from circuits and districts" as circumstances may make desirable; and to submit suggestions to the various courts "in the interest of uniformity and expedition of business." These and other provisions of the law have imparted a degree of unification and flexibility in handling court business which had been conspicuously lacking. The reform thus made in the administration of the federal courts has furthered the adoption of similar improvements in state courts, where the need is perhaps even greater.<sup>2</sup>

At the head of the federal judicial system—in a sense, at the head of the whole judicial system of the United States—stands the

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Unified  
adminis-  
tration  
of the  
courts

3. The  
Supreme  
Court

<sup>1</sup> *U. S. Compiled Statutes* (1923), p. 55; *Code of the Laws of the U. S.* (1926), pp. 893-894; *Jour. Amer. Judic. Soc.*, VI, 69-72 (Oct., 1922).

<sup>2</sup> W. H. Taft, "Possible and Needed Reforms in the Administration of Civil Justice in the Federal Courts," *Jour. Amer. Judic. Soc.*, VI, 36-47 (Aug., 1922). The proceedings of the first meetings of the judicial conferences



Supreme Court. Whereas the creation of the national courts described above was left optional with Congress, the establishment of one court which should be supreme was made mandatory by the constitution; although even here the details of organization and jurisdiction are largely left to congressional action. The Supreme Court was first organized under the Judiciary Act of 1789 with a chief justice and five associate justices. Since then the total number of judges has once been as high as ten, although at the present time (as for some years past) the court consists of nine members. All are appointed by the president and Senate and hold office during good behavior. They receive salaries which are fixed from time to time by Congress, subject to the single constitutional restriction that no judge's compensation shall be diminished while he continues in office. The chief justice now (1931) receives \$20,500, and the associate justices \$20,000.

The chief  
justice

Although receiving slightly higher compensation, the chief justice has, in reality, no more legal weight or influence in deciding cases than any of the associate justices. He is simply the presiding judge at sessions of the court, in which he acts as a sort of chairman in assigning to his associates the task of writing the court's decisions in cases that have been heard and discussed. His position in this respect does not, however, exempt him from performing his share of this kind of work. He also appoints members of the court to serve on committees which now and then prepare a revision of the rules governing equity procedure or the rules of practice in actions at law. In all, eleven chief justices have presided over our highest judicial tribunal since its foundation. In chronological order, they are: John Jay, 1789-1795 (resigned); John Rutledge, 1795-1796;<sup>1</sup> Oliver Ellsworth, 1796-1800 (resigned); John Marshall, 1801-1834; Roger B. Taney, 1836-1864; Salmon P. Chase, 1864-1873; Morrison R. Waite, 1874-1888; Melville W. Fuller, 1889-1910; Edward D. White, 1910-1921;<sup>2</sup> William H. Taft, 1921-1930; and Charles E. Hughes since 1930. The outstanding figure

are summarized in *Texas Law Rev.*, II, 458-463 (June, 1924), and *Harvard Law Rev.*, XL, 431-468 (Jan., 1927). The full text of the report for 1930 appears in *Annual Report of the Attorney-General of the United States* (1930), 4-8; also in *U. S. Daily*, Oct. 6, 1930, p. 2401.

<sup>1</sup> John Rutledge presided at only one session of the Court; his appointment was not confirmed by the Senate because of failing mental powers. He had served as associate justice from 1789 to 1791, when he resigned to become chief justice of the supreme court of South Carolina.

<sup>2</sup> Chief Justice White had served as associate justice from 1894 to 1910. He and John Rutledge are the only associate justices who have been advanced to the chief justiceship.

in the list is John Marshall,<sup>1</sup> who presided over the Court for more than thirty years, and who, because of his forceful and winsome personality, his firm and clear convictions in favor of a liberal construction of the powers of the national government, and the masterful logic and lucidity of style with which those convictions were expressed in many a notable decision during the formative period of our national institutions, is justly regarded as "the second father of the constitution." There have been associate justices also whose personality and influence upon our constitutional history entitle them to special mention, namely, James Wilson, 1789-1798; Joseph Story, 1811-1845; Stephen J. Field, 1863-1897; John M. Harlan, 1879-1911; and Oliver Wendell Holmes, 1902—. <sup>2</sup>

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Each member of the Supreme Court is assigned to one of the judicial circuits into which, as we have seen, the country has been divided; <sup>3</sup> and in early days the justices traveled about, holding sessions of the circuit or the district court at different places, and coming together at stated intervals at the capital for a session of the Supreme Court. Nowadays, however, the pressure of business at Washington is altogether too great to permit them to "go on circuit." Sessions of the Court are held annually in the old Senate chamber in the Capitol, beginning each year in October and lasting until about May. Six justices must be present at the argument of a case, and a majority must concur in any decision. When the Court is evenly divided, or the members differ so widely that a majority cannot reach an agreement, it is customary to order a re-arguing of the case, after which it is usually possible to arrive at some sort of a conclusion. <sup>4</sup>

Sessions

<sup>1</sup> On the influence of Chief Justice Marshall, see series of addresses delivered at the centennial celebration of his appointment, *John Marshall, Life, Character, and Judicial Services*, 3 vols. (Chicago, 1903); W. E. Dodd, "Chief Justice Marshall and Virginia," *Amer. Hist. Rev.*, XII, 776-787 (July, 1907); E. S. Corwin, *John Marshall and the Constitution* (New Haven, 1919); and A. J. Beveridge, *Life of John Marshall*, 4 vols. (Boston, 1916-19). There is also a two-volume edition of the last-mentioned work (1929).

<sup>2</sup> See O. K. McMurray, "Field's Work as Lawyer and Judge in California," *Cal. Law Rev.*, V, 87-107 (Jan., 1917); W. C. Jones, "Justice Field's Opinions on Constitutional Law," *ibid.*, V, 108-128 (Jan., 1917); C. B. Swisher, *Stephen J. Field, Craftsman of the Law* (Washington, 1930); F. B. Clark, "The Constitutional Doctrines of Justice Harlan," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXIII (1915); D. Richardson, "Constitutional Doctrines of Justice Oliver Wendell Holmes," *ibid.*, XLII (1924).

<sup>3</sup> Maps showing the different circuits and the places where federal courts are held will be found in *Register of the Department of Justice and the Courts of the United States* (30th ed., Washington, 1924), 155-166.

<sup>4</sup> A notable instance of this occurred in 1895, when the income tax law of 1894 was held unconstitutional (*Pollock v. Farmer's Loan and Trust Co.*).

The decisions or conclusions arrived at in each case are accompanied by more or less extended "opinions" showing the line of reasoning by which the Court reached its decision. Justices who concur in the decision of the majority may have arrived at that result in different ways; in such instances, one or more of them may write a "concurring" opinion. Those who are unable to concur in the decision of the majority are likewise permitted to write "dissenting" opinions.<sup>1</sup> All of these opinions are regularly published by the government, for the benefit of the legal profession and the general public, in a series of volumes known as *Reports*<sup>2</sup> and prepared under the editorial supervision of a reporter of decisions appointed by the Court. Decisions are handed down by the Supreme Court only in cases that come before it in one of the two ways about to be described. The principle was early established that the Court would refrain from submitting advisory opinions concerning matters presented to it by either Congress or the president.<sup>3</sup>

Cases come before the Supreme Court in one of two ways. A few may be commenced there, and over these the Court is said to have "original" jurisdiction. The constitution itself specifies that the Supreme Court shall have original (although not necessarily exclusive) jurisdiction in "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party."<sup>4</sup> In view of this provision, Congress may not enlarge the original jurisdiction of the Court; for that would be amending the constitution in an unauthorized manner.<sup>5</sup> The great majority of

<sup>1</sup> J. H. Clark, "How the United States Supreme Court Works," *Amer. Bar Assoc. Jour.*, IX, 80-82 (Feb., 1923).

<sup>2</sup> Reports of Supreme Court decisions handed down before 1882 are usually cited by the name of the reporter who prepared them for publication, as follows: Dallas, 4 vols., 1790-1800; Cranch, 9 vols., 1801-1815; Wheaton, 12 vols., 1816-1827; Peters, 16 vols., 1828-1842; Howard, 24 vols., 1843-1860; Black, 2 vols., 1861-1862; Wallace, 23 vols., 1863-1874; and Otto, 17 vols., 1875-1882. Since 1882, the *Reports* have been numbered consecutively, beginning with Volume 108, and are cited as 108 U. S., etc.

<sup>3</sup> A former solicitor-general (James M. Beck) has proposed that whenever Congress, by joint resolution approved by the president, should require from the Supreme Court an advisory opinion on proposed legislation of doubtful constitutionality, the Court should comply. The first and only time in its history when the Supreme Court rendered an advisory opinion was in Monroe's administration. The question then submitted by the president related to the constitutionality of federal appropriations to be expended wholly within a single state, and the Court's opinion was favorable. The supreme court in eight states is empowered to hand down advisory opinions. Objections to advisory opinions are set forth in *Constitutional Rev.*, VIII, 231-237 (Oct., 1924).

<sup>4</sup> On interstate disputes, see C. Warren, *The Supreme Court and Sovereign States* (Princeton, 1924).

<sup>5</sup> In 1789, Congress conferred original jurisdiction upon the Supreme Court in mandamus cases, and for that reason a part of the Judiciary Act of 1789

cases, on the other hand, come to the Supreme Court on appeal from either a lower federal court or the highest state courts. Appeals from the latter, however, may be carried to the Supreme Court only when some federal question is involved.<sup>1</sup>

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By far the most important and distinctive function of the Supreme Court is performed when that tribunal decides appeals from the highest state courts and passes upon other federal questions coming before it from the lower federal courts; for, in so doing, it acts as the guardian of the constitution, the upholder of the supremacy of national laws, and the defender of the reserved rights of the states. This will appear more clearly if we distinguish two large classes of cases coming before the Supreme Court for final judgment: (1) cases in which it is asserted that a state statute or a provision in a state constitution is in conflict with some clause in the national constitution, or with an act of Congress, or with some national treaty; and (2) cases in which some right or authority or immunity claimed to be derived from the national constitution, statutes, or treaties is in dispute.

Judicial  
review of  
legislation

As an illustration of what occurs in the first class of cases, let us suppose that A., relying upon the validity of a statute passed by his state legislature, brings suit against B. in the appropriate state or federal court, and that, in the course of the litigation, B. denies in legal form that A. has the right claimed under the state law, on the ground that this law is inconsistent with the national constitution, or with a law or treaty of the United States, and for that reason is no "law" at all. Therefore, since the constitution, laws, and treaties of the United States are declared to be "the supreme law of the land," B. prays the Supreme Court to declare

How the  
judicial  
veto has  
developed

was held void by the Supreme Court in the famous case of *Marbury v. Madison*, 1 Cranch 137 (1803). A mandamus is a writ issued by a court commanding a public officer, a corporation, or an inferior court to perform a specified duty imposed by some law. It must also be a ministerial duty, not one involving the exercise of any discretion by the party to whom the writ is directed. The right to issue this writ, and a number of other important writs, belongs to both federal and state courts.

<sup>1</sup> A leading case on the appellate jurisdiction of the Supreme Court is *Martin v. Hunter's Lessee*, 1 Wheaton 304 (1816). Appeals from the supreme court of the Philippine Islands may also be taken to the United States Supreme Court. Appeals from the district court of Alaska and the supreme court of Hawaii and of Porto Rico, which formerly went to the Supreme Court, now go to the circuit court of appeals. *Code of the Laws of the U. S.* (1926), pp. 895-896, 905-907.

Important changes in the appellate jurisdiction of the Supreme Court, made by act of Congress in 1925, are explained in G. Hankin, "The United States Supreme Court under the New Act," *Jour. Amer. Judic. Soc.*, XII, 40-43 (Aug., 1928); XIII, 92-94 (Oct., 1929).

null and void the state law upon which A. relies to win his suit. In order to determine the rights of the parties in such a case, the Supreme Court is obliged to declare whether, in its judgment, the state law in question is inconsistent (a) with any clause in the constitution granting exclusive authority to the national government, or (b) with any valid act of Congress, or (c) with any provision of a treaty of the United States, or (d) with any express limitation imposed upon the states by the constitution. If a majority of the members of the Court are convinced that the inconsistency asserted by B. actually exists, the justices, under their oath to support the constitution and laws of the United States as the "supreme law of the land," will refuse to enforce the rights claimed by A. The state statute thus held to be "unconstitutional" may remain on the statute-book for years, until the legislature sees fit to repeal it; but every one knows that if a similar case were to arise, the Court would, in all probability, reach the same decision. Therefore, for all practical purposes, the law is null and void, and the Supreme Court is said to have "nullified" it. In this way, the Court becomes the organ for declaring and enforcing the constitutional limitations upon the state governments mentioned at the beginning of this chapter. If, instead of an act of a state legislature, the validity of a clause in a state constitution had been in dispute, the court would likewise have been obliged to declare it null and void if a majority of the justices found it repugnant to anything in the national constitution, laws, or treaties.

Federal  
judicial  
review of  
state legis-  
lation un-  
der the  
police  
power

Cases of the latter sort are comparatively rare. But cases involving the constitutionality of state legislation are very numerous. Some state laws are alleged to infringe the right of Congress to regulate interstate commerce; others are said to impair the obligation of contracts, which is prohibited; a very much larger number are challenged because they are thought to be in conflict with clauses in the Fourteenth Amendment prohibiting the states from depriving any person of life, liberty, or property without "due process of law," and from denying to any person "the equal protection of the laws." The state statutes which are most frequently brought into controversy under these clauses are those enacted for the purpose of restricting the rights of liberty and property in order to promote and protect the public health, morals, safety, and general welfare; in other words, legislation enacted under the "police power." Such legislation is almost certain to be upheld if the Supreme Court is satisfied that the law in question

does not amount to an "unreasonable" interference with the rights of liberty and property, and that it bears a direct relation to the protection of the public health, morals, or safety, or to the promotion of the general welfare. On the whole, the Supreme Court has been rather more liberal in its interpretation of the vague phrases "due process of law" and "police power" than many state courts have been when the same or similar questions have come before them.<sup>1</sup> Indeed, some of the decisions of the Supreme Court in such cases have had an important liberalizing influence upon certain of the ultra-conservative state courts, when passing upon the constitutionality of laws enacted primarily for the welfare of the wage-earning classes.

In all of the foregoing cases, the Supreme Court serves either as the guardian of the powers of the national government against encroachments by the states or as the enforcer of the constitutional prohibitions upon the states. Turning to the second class of cases, *i.e.*, those in which one party asserts, and the other denies, some right or immunity derived directly from the national constitution, statutes, or treaties, we find the Supreme Court acting both as the guardian of the reserved rights of the states and as the medium through which the legislative and executive branches of the national government are restrained from overstepping the boundaries marked out for them in the fundamental law; and this function has resulted from the Court's performance of its ordinary judicial duties quite as naturally and logically as has its power to declare state laws unconstitutional. In order to make this clear, let us suppose that Congress has passed a law prohibiting the transportation in interstate commerce of goods in the manufacture of which children under the age of sixteen have been employed. Let us suppose also that A. is prosecuted by the Department of Justice for violating this law, and that he admits the facts as charged. In his defense, however, he asserts that the penalty named in the law should not be enforced against him, for the reason that the act of Congress on which the prosecution is based is not a regulation of commerce, which Congress is authorized to enact, but rather an attempt to regulate manufacturing within the state, a subject over which Congress has been granted no authority, and which, therefore, is left to be regulated exclusively by the states. Here, clearly, is a dis-

Judicial  
review of  
national  
laws and  
treaties

<sup>1</sup>See R. A. Brown, "Due Process, Police Power, and the Supreme Court," *Harvard Law Rev.*, XL, 943-968 (May, 1927), and E. S. Corwin, "Judicial Review in Action," *Univ. of Penn. Law Rev.*, LXXIV, 639-671 (May, 1926).

How a  
measure is  
"declared  
unconstitu-  
tional"

pute over the boundaries of national and state authority which calls for interpretation of the commerce clause of the constitution, and which must be decided by the Court before it can determine whether to order the enforcement of the penalty prescribed in the law.<sup>1</sup>

How does the Supreme Court meet such a question? Starting with the premise that the national government is a government of limited powers, which are enumerated in the constitution, that this constitution is the fundamental law to which all other laws and official acts of the government must conform, and that the law-making branch of the government may legally exercise no power for which warrant cannot be found in the constitution, the Court addresses itself to the task of examining the constitution to see if authority to pass this child labor law has been conferred, directly or by implication. If it becomes convinced that Congress has exceeded its authority as measured by the constitution (particularly the commerce clause), the Court will refuse to enforce the penalty against A. as demanded by the Department of Justice. The law is declared to be "unconstitutional," and is commonly said to be null and void thereafter, although it may remain on the statute-books for many years.<sup>2</sup> Speaking strictly, all that the Court does is to refuse to order the enforcement of the penalty against A., because the alleged law prescribing the penalty is in fact no law at all. But the public knows that a law, or alleged law, which the courts will not enforce is for all practical purposes null and void. If the validity of a national treaty provision is challenged in the course of litigation between parties, a similar line of reasoning is followed by the Court in order to ascertain whether the treaty-making organs of the government have exceeded their authority. In the same manner, too, the Court may be called upon to decide whether an act of Congress encroaches upon the sphere marked out by the constitution for either the judiciary or the executive; and if it does, the Court will be obliged to decline to enforce the law. Thus are the different branches of the government kept within the bounds set for them by the constitution—at least as that instrument is interpreted by the Supreme Court.

When the Supreme Court has defined the scope and meaning of clauses in the constitution which are involved in the decision of

<sup>1</sup> This is substantially the question that actually arose in connection with the child labor act of 1916, held unconstitutional in *Hammer v. Dagenhart*, 247 U. S. 251 (1918).

<sup>2</sup> See O. P. Field, "Effect of an Unconstitutional Statute," *Amer. Law. Rev.*, LX, 232-253 (Mar.-Apr., 1926).

specific cases, its rulings remain the final authoritative declaration of law upon that point until, as only rarely happens, this decision is reversed or modified.<sup>1</sup> Since the time of Chief Justice Marshall, the federal courts, and especially the Supreme Court, have applied such liberal canons of interpretation as to result in a "judicial expansion" of the constitution whereby its various provisions, adopted and given effect in the light of eighteenth-century conditions, have been stretched and adapted to meet the vastly different and wholly unforeseen conditions of the twentieth century without the necessity of numerous formal amendments.

This power of the Supreme Court to declare acts of Congress and provisions in national treaties unconstitutional, and therefore unenforceable, is thus seen to be the natural and logical working out of the ordinary judicial function of determining the rights of parties to litigation coming before an appropriate tribunal. Naturally, in exercising this far-reaching power the members of the Court are, like other men, consciously or unconsciously influenced more or less by their individual political, social, and economic theories, which, in turn, are largely the product of their past training and environment.<sup>2</sup> It would be surprising, therefore, if, in interpreting so broad and indefinite a phrase as "due process of law," the Court did not seem to read into the constitution the political and economic beliefs of the individual judges, thus furnishing ground for the statement sometimes made that "due process is what the Supreme Court says it is;" and it is not strange that on several occasions the Court has become the object of partisan political controversies.<sup>3</sup> In the presidential campaign of 1924, for example, the Progressive party and its presidential candidate, the late Senator La Follette, denounced this power of the Court, advocated popular election of all federal judges for limited terms, and proposed a constitutional amendment permitting Congress to reë enact laws which the Court had declared unconstitutional. The effect of such an amendment would be to make Congress the final authority on the constitutionality of laws, and the final judge of its own powers.

The  
Supreme  
Court and  
political  
contro-  
versies

Persons who have felt aggrieved by the Court's decisions deny-

<sup>1</sup> On the question whether Congress may pass a law contrary to a decision of the Supreme Court, see H. M. Bowman, "Congress and the Supreme Court," *Polit. Sci. Quar.*, XXV, 20-34 (Mar., 1910).

<sup>2</sup> See C. G. Haines, "Political Theories of the Supreme Court from 1789-1885," *Amer. Polit. Sci. Rev.*, II, 221-244 (Feb., 1908).

<sup>3</sup> Notable instances are the Dred Scott case in 1857 and the income tax case in 1895.



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or  
grantee?"

ing to Congress the right to enact certain legislation have been quick to point out that nowhere in the constitution can any provision be found which expressly confers upon the judiciary this extraordinary and distinctive power. From this negative circumstance, some extremists have been led to assert that the framers of the constitution intentionally withheld such authority, and that, therefore, in claiming and exercising the right to veto acts of Congress, the national judiciary has "usurped" power not granted to it.<sup>1</sup> Much time and energy have been expended by students of American constitutional history in trying to ascertain the real intention of the framers of our fundamental law on this point. On the whole, their researches have been rather inconclusive, so far as direct historical evidence is concerned. Nevertheless, the power of our courts to declare acts of Congress unconstitutional, first judicially asserted by the Supreme Court in the case of *Marbury v. Madison*<sup>2</sup> in 1803, is now generally accepted as one of the great bulwarks of both personal and property rights against legislative, and even executive, encroachment.

"Five-to-four" decisions

Quite apart from such sweeping attacks as have been noted, there are people who, although unwilling to deprive the Supreme Court of the power to set aside laws, feel that much ground for criticism would be removed if the concurrence of more than a bare majority of the justices were required before laws are declared unconstitutional. Much criticism in recent years has been directed against "five-to-four," or "one-man," decisions of this sort. There have been, as a matter of fact, very few such decisions—nine, in all.<sup>3</sup>

<sup>1</sup> This assertion appeared in the platform of the Socialist party in 1916 and in several preceding presidential campaigns. See C. A. Beard, "The Supreme Court: Usurper or Grantee?," *Polit. Sci. Quar.*, XXVII, 1-35 (Mar., 1912), and *The Supreme Court and the Constitution* (New York, 1912). The opposing views on this subject are well set forth in H. A. Davis, "Annulment of Legislation by the Supreme Court," *Amer. Polit. Sci. Rev.*, VII, 541-587 (Nov., 1913, and in a reply to this article by F. E. Melvin, "The Judicial Bulwark of the Constitution," *ibid.*, VIII, 167-203 (May, 1914).

<sup>2</sup> For a criticism of the decision in this case, see E. S. Corwin, *The Doctrine of Judicial Review and the Constitution* (Princeton, 1914), Chap. I; J. A. C. Grant, "Marbury v. Madison To-day," *Amer. Pol. Sci. Rev.*, XXIII, 673-681 (Aug., 1929); A. C. McLaughlin, "Marbury v. Madison Again," *Amer. Bar Assoc. Jour.*, XIV, 155-159 (Mar., 1928).

<sup>3</sup> *Ex parte Garland*, 4 Wallace 333 (1866); *Pollock v. Farmers Loan and Trust Co.*, 158 U. S. 601 (1895); *Fairbanks v. United States*, 181 U. S. 283 (1901); *Employer's Liability Cases*, 207 U. S. 463 (1908); *Hammer v. Dagenhart*, 247 U. S. 251 (1918); *Eisner v. Macomber*, 252 U. S. 189 (1920); *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920); *Newberry v. United States*, 256 U. S. 232 (1921); and *Adkins v. Children's Hospital*, 261 U. S. 525-571 (1923). See T. J. Norton, "What Damage Have Five-to-Four Decisions Done?," *Amer. Bar Assoc. Jour.*, IX, 721-727 (Nov., 1923); R. E.

In several instances, however, they have overthrown laws in which vast numbers of people have, for various reasons, been deeply interested; and it has been plausibly argued that such decisions would carry much greater weight if more than a bare majority, say two-thirds, of the judges were required to concur before setting any law aside. In pursuance of this idea, several constitutional amendments have recently been introduced in Congress requiring the agreement of six or seven of the nine justices in order to declare a law unconstitutional. Perhaps, however, a constitutional amendment is not needed to bring about these desired changes; at all events, it is interesting to note that a former member of the Court has suggested and urged that the Court should itself voluntarily adopt a rule of the kind proposed.<sup>1</sup>

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Notwithstanding all the criticism that has been directed against the practice of judicial review of legislation, it seems eminently fitting that the final determination of the constitutional powers of both the executive and legislative branches of our national government should rest with the judiciary rather than with either the executive or Congress. Upon the action of each of the latter branches, the constitution has placed numerous restrictions in the interest of the rights and liberties of the individual. If these authorities were permitted to measure their own powers under the constitution, especially in times of public stress, such restraints would be rendered inoperative in the very emergency which they were designed to meet. Furthermore, the judiciary is the weakest of the three branches of the national government. It controls

The  
Supreme  
Court the  
safest  
arbitrer

Cushman, "Constitutional Decisions by a Bare Majority of the Court," *Mich. Law Rev.*, XIX, 771-803 (June, 1921); F. R. Savidge, "Five-to-Four Supreme Court Decisions," *No. Amer. Rev.*, CCXIX, 460-473 (Apr., 1924). The fallacy in the phrase "one-man decisions" is brought out clearly in W. B. Munro, *The Government of the United States* (rev. ed.), 410-412.

<sup>1</sup> Former Justice John H. Clarke, in *Amer. Bar Assoc. Jour.*, IX, 689-692 (Nov., 1923). A summary of the various attacks upon the Supreme Court throughout its history, and of proposed ways of curbing the Court, will be found in A. H. Monroe, "The Supreme Court and the Constitution," *Amer. Polit. Sci. Rev.*, XVIII, 737-759 (Nov., 1924). Recent congressional proposals limiting the power of the Court are given in *Congressional Digest*, II, 259-287 (June, 1923). Cf. C. Warren, "Shall We Re-make the Supreme Court? The Origin of Its Powers," *Nation*, CXVIII, 526-528 (May 7, 1924); C. G. Haines, "Shall We Re-make the Supreme Court? The Practice of Other Countries," *ibid.*, 553-556 (May 14, 1924), reprinted in F. G. Crawford, *Readings in American Government*, 229-252; G. W. Alger, *The Old Law and the New Order* (Boston, 1913), Chaps. I, VI; H. Hendricks, "Some Pros and Cons of Judicial Review of Legislation," *Texas Law Rev.*, III, 134-151 (Feb., 1925); *New Republic*, XL, 110-113 (Oct. 1, 1924), "The Red Terror of Judicial Reform"; R. L. Hale, "Judicial Review versus Doctrinaire Democracy," *Amer. Bar. Assoc. Jour.*, X, 882-886 (Dec., 1924).

Moderate  
use of the  
judicial  
veto

neither the purse nor the sword. Unassisted, it is unable to attack either of the other branches, or to do serious injury to political or civil liberty. Its members are less likely to be influenced by momentary passion than are the members of Congress—perhaps than even the president. Undoubtedly it is safe to conclude that, with the judiciary possessed of this negative control over Congress and the executive, the limitations of the constitution have been more scrupulously observed and strictly enforced than would otherwise have been the case.<sup>1</sup> Moreover, it ought to be pointed out that the federal judiciary has made very moderate use of its power to veto acts of Congress, and even acts of state legislatures. Only a very small percentage of all the measures passed by Congress and by the several state legislatures since the foundation of the government have been nullified by the judiciary on the ground of unconstitutionality.<sup>2</sup> Since the organization of the Court a hundred and forty years ago, only about fifty decisions have been handed down in which acts of Congress were declared unconstitutional; and in only about a dozen instances have these decisions evoked anything more than casual criticism.<sup>3</sup> Finally, it is desirable to repeat that the Supreme Court never passes upon the constitutionality of either an act of Congress or an act of a state legislature unless it becomes necessary to do so in determining the rights of the parties to cases coming before the courts in the ordinary course of litigation.<sup>4</sup>

National  
courts  
outside  
of the  
"federal  
judicial  
system"

Up to this point, all that has been said concerning the scope of judicial power of the United States and the system of federal courts has been in the nature of a commentary upon the third article of the constitution, which is commonly called the judiciary article; and it should be repeated that the provisions of this article constitute the real foundation of what is called the "federal judicial system." But to stop with a description of the courts which make up this federal judicial system would mean to leave unmentioned several important tribunals which, although created and organized under national authority, do not belong to the federal system described above. In creating and organizing these special

<sup>1</sup> J. P. Hall, *Constitutional Law*, 35.

<sup>2</sup> An analysis and tabulation of such cases, prior to 1913, will be found in B. F. Moore, "The Supreme Court and Unconstitutional Legislation," *Columbia Univ. Studies in Hist., Econ. and Public Law*, LIV, 97-252 (1913).

<sup>3</sup> A. H. Monroe, "The Supreme Court and the Constitution," *Amer. Polit. Sci. Rev.*, XVIII, 748 (Nov., 1924).

<sup>4</sup> It should be remembered that, unlike the supreme courts in some states, the federal Supreme Court never hands down advisory opinions respecting the constitutionality of pending legislation.

courts, Congress has a very free hand with respect to the tenure, compensation, and appointment of judges, and also the scope of jurisdiction and methods of procedure. Indeed, when legislating on such courts, Congress is in no way bound by any of the limitations found in the judiciary article. It may, for example, provide that the judges shall serve for only limited terms instead of during good behavior; and in several instances it has done so. These courts are therefore called "legislative courts" to distinguish them from the "constitutional courts" established under Article III of the constitution.<sup>1</sup>

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Whence, then, if not from the judiciary article, does Congress derive authority to create these additional national courts? The answer is that it comes, not only from the general power to "constitute tribunals inferior to the Supreme Court," but more specifically from the following sources: (1) the power to regulate commerce and to grant patents; (2) the power to appropriate money to pay claims against the United States; (3) the power to make all needful rules and regulations for the government of the territories and dependencies; (4) the grant of exclusive authority over the District of Columbia; and (5) the power to enact legislation to render national treaties effective. A court arising from the first of these sources of authority is the Court of Customs and Patent Appeals created in 1909.<sup>2</sup> This tribunal, consisting of five judges appointed by the president and Senate, hears and decides appeals from rulings made by the United States Customs Court<sup>3</sup> in administering the tariff laws, and by the commissioner of patents in administering the patent laws. In the great majority of cases, its decision is final, although the Supreme Court may assume final jurisdiction in certain matters of exceptional importance.<sup>4</sup> From the second source, Congress derived authority to create, in 1855, the Court of Claims.<sup>5</sup> The five judges of this court, appointed by the

Authority  
for setting  
up these  
courts

<sup>1</sup> W. G. Katz, "Federal Legislative Courts," *Harvard Law Rev.*, XLIII, 894-924 (Apr., 1930).

<sup>2</sup> *U. S. Compiled Statutes* (1918), pp. 164-166; *Code of the Laws of the U. S.* (1926), pp. 901-903. The judges of this court receive salaries of \$12,500. From 1909 to 1929, this court was called the Court of Customs Appeals. In 1929, its jurisdiction was extended to cover patents.

<sup>3</sup> This is the new name given to the board of general appraisers in 1926. The court consists of a chief justice and nine associate justices, each receiving \$10,500 a year. *Code of the Laws of the United States* (1926), pp. 596-597, 1948.

<sup>4</sup> On the value of this court, see comments of Judge O. E. Bland, *U. S. Daily*, Apr. 13, 1929, p. 352.

<sup>5</sup> *U. S. Compiled Statutes* (1918), pp. 159-164; *Code of the Laws of the U. S.* (1926), pp. 896-901, 2032-2033. The judges of the Court of Claims receive salaries of \$12,500. See J. H. Toelle, "The Court of Claims; its Juris-

president and Senate and holding office during good behavior, investigate contractual claims against the United States, brought before the court by private parties or referred to it by an executive department or by Congress. In some cases, their decisions are final, subject to appeal to the Supreme Court; in others, they merely report their findings to Congress or to the department concerned. Both this court and the Court of Customs and Patent Appeals are thus largely administrative courts. The express grant of power to govern territories has been the legal foundation upon which regularly organized courts have been erected in all the territories and most of the dependencies.<sup>1</sup> In the fourth source mentioned above, Congress finds ample authority for establishing in the District of Columbia a court of appeals, a supreme court (inferior to the former), a municipal court, a police court, and a juvenile court. Lastly, in order to give effect to treaties which confer judicial powers upon American consuls in China, Congress, in 1906, created the United States Court for China, with a special judge appointed by the president and Senate, with headquarters in Shanghai. Its main business is to pass upon appeals from decisions of the American consular courts in that country. From its decisions, appeals may be taken directly to the federal circuit court of appeals for the ninth circuit, and ultimately, if desired, to the Supreme Court.<sup>2</sup>

District  
attorneys  
and  
marshals

To complete this description of the organization of the national courts, mention should be made again of the district attorneys and marshals, who, although not belonging to the federal judiciary in the strict sense, are closely connected with it and are necessary to its successful operation. These officials are appointed by the president and Senate for four-year terms, on recommendation of the attorney-general. Both a district attorney and a marshal are found in every judicial district. The district attorney presents to the grand jury any cases of violation of national laws which come to his attention; and if that body brings an indictment, it falls to him to conduct the case of the government against the accused person. His work, therefore, corresponds to that of county prosecuting officers who act under state authority; and over it the attorney-diction and Principal Decisions Bearing on International Law," *Mich. Law Rev.*, XXIV, 675-697 (May, 1926).

<sup>1</sup> See below, Chap. xxix.

<sup>2</sup> *Code of the Laws of the U. S.* (1926), pp. 655-657. See C. S. Lobinger, "The Judicial Superintendent in China," *Illinois Law Rev.*, XII, 403-408 (Jan. 1918); W. R. Austin, "Law Courts in China," *Case and Comment*, XXIV, 956-961 (May, 1918).

general has a somewhat indefinite supervision.<sup>1</sup> The marshals and their deputies are charged with arresting and holding in custody persons accused of crime, summoning jurymen, serving legal processes, executing the judgments of the federal courts, and protecting federal judges from personal violence when engaged in the performance of their official duties.<sup>2</sup>

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XXIII

In each federal judicial district, the district judge appoints a number of United States commissioners who hold office for four years, subject to removal at any time by the appointing judge. These commissioners are empowered to administer oaths, issue warrants for the arrest of persons accused of violating federal laws, subpoena witnesses, conduct preliminary hearings of accused persons, and to discharge them or admit them to bail; in numerous other ways also, they assist in expediting the enforcement of the federal criminal laws.

U. S. com-  
missioners

Finally, it is necessary to note some aspects of the relations of the judiciary to the executive and legislative branches. First of all, it should be observed that the framers of the constitution, by declaring that federal judges should hold office "during good behavior," and by prohibiting Congress from diminishing their compensation while they continue in office, sought to free the judiciary from any sense of dependence upon, or undue influence by, either the executive or Congress; and in this they were completely successful, so far as the judges individually are concerned. In performing their official duties, federal judges, individually, are far more independent of outside influences than are most of the state judges, who are elected or appointed for short terms. Nevertheless, the judiciary, as a branch of the government, enjoys no such independence from the other branches as either of them enjoys with respect to the other and to the judicial branch; and the reasons are not far to seek. In the first place, the constitution itself names only one federal court, the Supreme Court, and leaves all inferior courts to be provided for, and their jurisdiction to be defined, by the joint action of Congress and the executive. Second, even in the case of the Supreme Court, Congress and the president have to cooperate in organizing it, in determining the number of judges, in

Relation  
of the  
judiciary  
to other  
branches  
of the  
government

<sup>1</sup> The duties of the district attorney are more fully set forth in *U. S. Compiled Statutes* (1918), pp. 181-182; *Code of the Laws of the U. S.* (1926), pp. 915-916.

<sup>2</sup> On the duties of marshals, see *U. S. Compiled Statutes* (1918), pp. 182-183; *Code of the Laws of the U. S.* (1926), pp. 916-917. Cf. *In re Neagle*, 135 U. S. 1 (1890).

fixing their compensation, and in regulating appellate jurisdiction. Third, all federal judges are appointed by the president and Senate.<sup>1</sup> Finally, the assistance of the executive may become indispensable to the enforcement of the decrees or other processes issued by the courts.

As a result of one or more of these circumstances, it is legally possible for Congress and the president to increase the number of judges in any federal court, and, by filling the new positions with judges whose views upon questions of public policy coincide with those of the president and a majority of the Senate, to overcome or counteract the influence of what would otherwise be a majority of judges holding different views. Or, to take another possible instance, Congress may reduce the size of the Supreme Court, or of any other federal court, by enacting that vacancies shall not be filled until the number of judges reaches a certain diminished point. Congress may even go so far as to deprive the Supreme Court of its appellate jurisdiction over a given class of cases, as once happened during the Reconstruction period following the Civil War, when an unfavorable decision on the constitutionality of certain acts was anticipated. Rarely, however, if at all, has there been clear evidence of an intention on the part of either the president or Congress to "pack," or otherwise influence the decisions of, the Supreme Court. Not quite as much can be said of the inferior federal courts, over which Congress has more direct control. The Federalist Congress in 1801 created new circuit judgeships in order to have a Federalist president fill them with Federalist judges; and a few months later, a Jeffersonian-Republican Congress, for equally partisan reasons, abolished the new positions.<sup>2</sup> Happily, however, these instances of avowedly partisan interference with the judicial system stand practically alone; at the time of the latest reorganization of the federal courts, in 1911, when the separate set of circuit courts was abolished, partisan motives were entirely absent,

<sup>1</sup> In nine instances, presidential appointments to the Supreme Court have been rejected by the Senate; John Rutledge (1795), Alexander Wolcott (1811), John C. Spencer (1844), George W. Woodward (1846), Jeremiah S. Black (1861), Ebenezer R. Hoar (1870), William B. Hornblower (1894), Wheeler H. Peckham (1894), and John J. Parker (1930). In a few other instances, nominations have been withdrawn before final action by the Senate. The debate following the nomination of Judge Parker is well reported in the *U. S. Daily*, April 30, 1930, and following issues. Numerous articles on his rejection may be found by consulting the *Readers' Guide to Periodical Literature*.

<sup>2</sup> M. Farrand, "The Judiciary Act of 1801," *Amer. Hist. Rev.*, V, 682-686 (July, 1900); W. S. Carpenter, "Repeal of the Judiciary Act of 1801," *Amer. Polit. Sci. Rev.*, IX, 519-528 (Aug., 1915).

and the same thing was largely true when the short-lived Commerce Court was abolished, in 1913, after an existence of only two years.<sup>1</sup>

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In extreme cases, where enforcement of court processes is resisted by combinations too strong to be overcome by the marshals and their deputies, the federal courts are obliged to call upon the president for the aid of the armed forces. If he is unsympathetic toward the court's attitude, he may refuse to act; in which event the court is helpless and its orders or decrees may be completely nullified. An instance of this sort occurred in the administration of President Jackson, when the Supreme Court upheld certain claims of the Cherokee Indians, while the president sided with the Georgia authorities, who forcibly and successfully resisted the execution of the Court's decision.<sup>2</sup>

Enforcement of  
court  
processes

Finally, it is legally possible for Congress, from partisan motives, to attack members of the federal judiciary through impeachment proceedings charging individual judges with treason, bribery, or "other high crimes and misdemeanors," as occurred in the impeachment of Judges Pickering and Chase during the presidency of Jefferson. Impeachment is the only method prescribed in the constitution for the removal of judges who become unfit for judicial office for any reason whatsoever, including physical, mental, or moral defects.<sup>3</sup> It has been resorted to, in all, in only a half-dozen instances,<sup>4</sup> and has resulted in conviction and removal in only three. A few judges of inferior federal courts have resigned when impeachment proceedings seemed imminent. But in all of this, partisan considerations have played little or no part, except in the two impeachment cases mentioned.

Impeachment of  
judges

<sup>1</sup> J. A. Fowler, "The Commerce Court," *No. Amer. Rev.*, CXCVII, 464-476 (Apr., 1913). See also *Harvard Law Rev.*, XXXIX, 594-615 (Mar., 1926).

<sup>2</sup> This incident arose in connection with the cases of *The Cherokee Nation v. Georgia*, 5 Peters 1 (1831), and *Worcester v. Georgia*, 6 Peters 515 (1832).

<sup>3</sup> By act of Congress, federal judges who have served ten years continuously may, upon reaching the age of seventy, retire upon full salary. *Code of the Laws of the U. S.* (1926), p. 908.

<sup>4</sup> The successful impeachment proceedings were those against John Pickering, 1803-04; West H. Humphreys, 1862; and Robert W. Archbald, 1912-13. The unsuccessful cases were those against Samuel Chase, 1804-05; James H. Peck, 1830-31; and Charles Swayne, 1904-05. In April, 1926, the House of Representatives, by a vote of 306 to 62, adopted articles of impeachment against George W. English, judge of the district court for the Eastern District of Illinois; but on the eve of the trial Judge English resigned, and the impeachment proceedings were discontinued. See *Literary Digest*, LXXXIX, 5-7 (April 17, 1926). Cf. *Proceedings in the Trial of Impeachment of Robert W. Archbald*, 62nd Cong., 3rd Sess., Sen. Doc. No. 1140 (1913); R. W. Carrington, "The Impeachment Trial of Samuel Chase," *Va. Law Rev.*, IX, 485-500 (May, 1923). For additional references on federal impeachment cases, see p. 523, n. 1.



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## CHAPTER XXIV

### THE POWERS OF CONGRESS: GENERAL VIEW

A prevalent misconception

"No misconception in respect to the organization of the state and of the functions of the various parts of its governmental machinery," says an American political scientist, "is more prevalent than that the national assembly—the parliament, the congress, the legislative chambers, as the case may be—is simply, or primarily, a body for the formulation and passage of general laws for the determination of the rights and duties of the citizen body for which it acts. The enactment of public laws of this character is undoubtedly one of its functions, and it need scarcely be said, an exceedingly important one. That this is not its sole function, indeed is not the one making the largest draft upon its time, is at once apparent if an attempt is made to analyze the work really done by it."<sup>1</sup>

Functions of Congress:

This statement is no less true of the Congress of the United States than of the legislature of Pennsylvania or Ohio, on the one hand, or the parliament of Great Britain, France, or Germany, on the other. Congress is, indeed, a law-making body; but it is far more than that. Its readily distinguishable functions (exercised by one house or both) are at least six in number: (1) constituent, (2) electoral, (3) executive, (4) judicial, (5) supervisory and directive, and (6) legislative—an enumeration which of itself is sufficient to indicate that Congress, like the presidency, although established with a view to a separation of powers, deviates from that principle in its actual powers and workings at almost every turn.

1. Constituent

Some of the functions named above have been sufficiently considered in earlier portions of this book, and are but mentioned here in order that the actual range and diversity of congressional activities may not be lost to view. In describing the modes by which the national constitution is amended, we saw that, while Congress cannot itself under any circumstances make a change in the fundamental written law, no alteration thereof can be brought about without congressional action. Congress prescribes whether pro-

<sup>1</sup> W. F. Willoughby, "The Correlation of the Organization of Congress with that of the Executive," *Amer. Polit. Sci. Rev.*, Supp., VIII, 155 (Feb., 1914).

posed amendments shall be ratified in the states by the legislatures or by conventions; it may call a national convention to formulate amendments on application of the legislatures of two-thirds of the states; in point of actual practice, it first adopts all proposed amendments, and then puts them before the states for action.<sup>1</sup> In considering the mode of electing the president and vice-president, we have seen that Congress acts as a board to canvass the electoral vote and declare the results, and that in event of the failure of an electoral majority, the House of Representatives chooses the president from the three candidates having the largest number of votes, and the Senate similarly chooses the vice-president from the two candidates standing highest.<sup>2</sup> We have seen that, while the Senate did not develop into a general executive council on the lines at one time anticipated by Washington, it shares with the president, by express constitutional provision, the executive functions of appointment and treaty-making.<sup>3</sup>

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XXIV2. Elec-  
toral3. Execu-  
tive

Three of the six functions enumerated above remain, namely, judicial,<sup>4</sup> supervisory and directive, and legislative; and a brief general survey of these may properly be taken before we proceed to consider in more detail, in succeeding chapters, certain selected congressional powers of exceptional importance and complexity.

The constitution endowed the president and Senate with extensive powers of appointment. But how was an unfit officer to be got rid of if he could not be induced to resign? We know now that the power to appoint came to be construed to involve the power to remove. But this development could not definitely be foreseen by the constitution's makers; besides, the president or other appointing officer might be lax about making desirable removals. The judges were to hold office during good behavior. But how could they be severed from their positions if their behavior ceased to be good? How should the president himself, in case of remissness, be made to turn over his office to a successor?

4. Judicial

The answer lay ready at hand in the historic English device of impeachment. To be sure, the growth of cabinet responsibility was already making impeachment unnecessary in the mother country; and the practice there is now obsolete. But the makers of our constitution saw no better mode of protection against abuse of power

Impeach-  
ment: the  
constitu-  
tional  
provision

<sup>1</sup> See pp. 161-163 above.

<sup>2</sup> See pp. 246-249 above.

<sup>3</sup> See pp. 272-273, 284-287 above.

<sup>4</sup> M. V. Voorhies, "Judicial Functions and Powers of Congress," *Va. Law Rev.*, III, 632-641 (June, 1927).

or other serious official misconduct. Hence they wrote into the document the provision that "the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."<sup>1</sup> Provisions for the impeachment of state officers likewise early found their way into most state constitutions.

Who can be  
impeached

Under the clause cited, only civil officers are subject to impeachment; military and naval officers are liable to trial by court-martial, but cannot be impeached. Members of Congress, furthermore, although civil officers, are commonly considered to be exempt.<sup>2</sup> The grounds for impeachment are stipulated as clearly, perhaps, as is possible. Bribery is self-explanatory, and treason is defined by the constitution.<sup>3</sup> "High crimes and misdemeanors" is a flexible phrase, but one which has generally been construed to include only offenses of a grave nature involving something more than mere inefficiency or partisanship.

Impeach-  
ment  
procedure

The process of impeachment can be stated briefly. It starts in the House of Representatives, where, upon charges being made against a given official, a committee is appointed to investigate. The committee reports to the House; and if, upon consideration of the findings, the majority so votes, the charges, in the form of "articles of impeachment," are sent to the Senate and a committee of "managers" is designated to conduct the trial. The Senate has no option but to hear the case. It furnishes the accused with a copy of the charges against him, fixes the date for the trial to begin, and when the time arrives converts itself into a court, under the chairmanship of its regular presiding officer, unless the president of the United States is on trial, in which case the chair is occupied by the chief justice of the Supreme Court. The accused is allowed counsel, and he may appear and give testimony in person; and witnesses, for and against him, are brought in and questioned. At the close of the proceedings, which may last through many weeks, the public is excluded and the Senate votes. It takes a two-thirds vote to convict; anything less results in acquittal. The penalty, in case of conviction, is removal from office, to which may be added disqualification for ever holding "any office of honor, trust, or profit under the United States;" and the president's power of pardon and re-

<sup>1</sup> Art. II, § 4.

<sup>2</sup> The unsuccessful impeachment of Senator William Blount of Tennessee, in 1798, is the only case involving a member of Congress.

<sup>3</sup> Art. III, § 3, cl. 1.

prieve does not apply. Once retired to private life, furthermore, the convicted person may be proceeded against in the ordinary courts like any other person if he has committed an indictable offense.

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In the entire history of the country, impeachment proceedings have been brought against only ten federal officers; and only three have been convicted. On charges based chiefly upon alleged violations of the Tenure of Office Act, passed over a veto in 1867, President Johnson came within one vote of being convicted in 1868. Failure to convict also attended the impeachment of William W. Belknap, secretary of war, in 1876. As we have seen, all of the three officers convicted belonged to the judiciary. Two of them were district judges; one, tried in 1913, was a judge of the now defunct Commerce Court.<sup>1</sup>

Past im-  
peachment  
cases

It has not been customary among writers, and certainly not in Congress, to consider the two functions that remain to be spoken of—(a) administrative supervision and direction and (b) legislation—as entirely separate; and the distinction cannot, without indulging in a species of pedantry, be carried consistently through the account of congressional activities which follows. Nevertheless, there is a difference which ought to be noted; it is intrinsically important, and more will undoubtedly be made of it in the future than in the past. The great bulk of congressional activities has to do with such matters as “the determination, subject to constitutional limitations, of how the government, and particularly the administrative branch of the government, shall be organized, what work shall be undertaken, how such work shall be performed, what sums of money shall be applied to such purposes, and how this money shall be raised and disbursed. From this standpoint, the legislature is the board of directors of the public corporation. Representing and acting for the citizen stockholders, it is its function to give orders to administrative officers; and, as a correlative and necessary function, to take such action as will enable it at all times to exercise a rigid supervision and control over the latter with a view to seeing that its orders are properly and efficiently carried out. Manifestly, this function is quite distinct from that of acting as a law-making body, strictly speaking. It is unfor-

5. Super-  
visory and  
directive

<sup>1</sup> R. Foster, *Commentaries on the Constitution of the United States* (Boston, 1895), 505-632; D. S. Alexander, *History and Procedure of the House of Representatives*, Chap. xvii; D. Y. Thomas, “The Law of Impeachment in the United States,” *Amer. Polit. Sci. Rev.*, II, 378-395 (May., 1908); A. Simpson, *A Treatise on Federal Impeachments* (N. Y., 1917); *Extracts from the Journal of the United States Senate in All Cases of Impeachment . . . 1798-1904*, 62nd Cong., 2nd Sess., Sen. Doc. No. 876 (1912).

tunate that the same designation, 'laws' or 'statutes,' is given to both classes of documents through which the action is set forth. Laws, from the juristic standpoint, have to do with the formulation and enactment of general rules of conduct to govern the relations between individuals and between individuals and the government. They have to do with rights and duties and the means of their enforcement. They are intended to be general and permanent. Enactments for the purpose of giving directions to officers of the government are for the most part but administrative orders. The major part of them have only a temporary end in view."<sup>1</sup>

When Congress passes a measure regulating commerce among the states, or extending citizenship to the inhabitants of Porto Rico, or forbidding paupers to be admitted to the country, or prescribing punishments for counterfeiting the securities or current coin of the United States, it is making laws, in the proper sense of the term. When it authorizes the construction of a bridge or a public building, provides for the organization or reorganization of executive departments, establishes a consulate at Aden, appropriates money for a national bureau of efficiency, or prescribes how immigrants shall be inspected, it is really only making rules or arrangements of a business or administrative character. And the point to be impressed is that it is this latter sort of thing that absorbs the major part of the time and energy of the two houses.

To a remarkable extent—to a far greater extent, as has been pointed out, than the English Parliament—Congress concerns itself with the organization, procedure, and activities of the executive and administrative organs and agencies of the government, creating and abolishing offices, starting new lines of activity, allotting funds to departments and enterprises, receiving reports, making investigations,<sup>2</sup> issuing rules, criticizing and admonishing—in short, "running the government," very much, indeed, as a board of directors runs a great business organization. In performing this function, the two houses use the same machinery and act in the same way as in making laws. But the nature of the work performed is different in the two cases, and something would be gained if the rules of organization and procedure were shaped in accordance with this fact; although one is obliged to add that a change in this direction is hardly to be expected.

Without attempting to hold rigidly to the foregoing narrow and

<sup>1</sup> W. F. Willoughby, *Government of Modern States*, 301-302.

<sup>2</sup> For references on the investigative function of Congress, see p. 538 below.

exact definition of the legislative function, we may now turn to consider the status which Congress occupies in our system as a law-making body; after all, Congress is primarily a legislature. The first thing to be observed is that whatever law-making power the national government possesses belongs to Congress: "all legislative power herein granted," says the constitution, "shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."<sup>1</sup> Not only is all national law-making authority thus conferred on Congress, but that body cannot, under the wording of this provision, delegate its essential legislative authority to the president or to any other branch or organ of the government. This does not mean, however, that it may not authorize the president to decide when a certain law shall go into effect, or that it may not establish by law some general rule or principle and then empower the president or some administrative board to apply the rule to special cases as they arise.<sup>2</sup> Some problems, like those connected with the fixing of freight and passenger rates in interstate commerce, are so complicated that Congress long ago gave up the attempt to solve them by exact and detailed legislation. In the instance mentioned, for example, it was prescribed that all rates should be reasonable, and an expert body, the Interstate Commerce Commission,<sup>3</sup> was created to which was assigned the duty of determining the reasonableness or unreasonableness of rates in specific cases. For similar reasons, power to apply other general laws has been conferred upon the Federal Trade Commission and various other administrative bodies.<sup>4</sup> The inability of Congress to delegate its strictly legislative powers would seem to render of doubtful constitutionality, if not totally invalid, any congressional action authorizing a nation-wide referendum as a means of determining acceptance or rejection of a measure. Without a constitutional amendment, Congress cannot, it is believed, delegate its legislative power even to the whole people.

In the second place, it is to be observed that Congress does not have full and unrestricted legislative power, like the English Parliament, but only "all legislative power *herein granted*;" in other words, every exercise of legislative power by Congress must be

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6. Legis-  
lative

Restricted  
scope of  
congres-  
sional  
power

<sup>1</sup> Art. I, § 1, cl. 1.

<sup>2</sup> And, of course, it does not prevent the president from participating in the work of legislation as described in Chap. xvi above.

<sup>3</sup> See pp. 598-600 below.

<sup>4</sup> See pp. 604-606 below. Cf. C. K. Burdick, *The Law of the American Constitution*, 149-154.



based upon some authorization in the constitution. When, therefore, certain legislation is proposed or demanded, its advocates must be able to point to some clause of the constitution which, either expressly or by fair implication, grants the necessary authority. On the other hand, if the opposition can show that there is no constitutional sanction, it will be useless for Congress to enact the proposed measure; for the Supreme Court, which is the final judge of congressional powers, will be practically certain to find that Congress has exceeded its authority, and that, accordingly, the supposed statute is void. This restricted scope of congressional power easily explains why debates on the constitutionality of proposed laws occupy so much time and attract such wide attention in connection with congressional proceedings.

Express  
grants

The situation, in a nutshell, regarding congressional legislative power is that (a) such power is defined positively by numerous express grants, (b) it is defined negatively by almost equally numerous express prohibitions, and (c) between these two fields lies a broad, ill-defined, disputed domain of implied and resulting powers. Upon many matters, there can be no question as to congressional power, because power has been conferred in definite and unmistakable terms. This is true of a long list of subjects enumerated in the eighth section of Article I, including currency, patents, copyrights, bankruptcy, taxation, naturalization, the regulation of foreign and interstate commerce, declaring war, and maintaining an army and navy.

Permissive  
and man-  
datory  
powers

Most of the powers expressly conferred upon Congress are permissive; that is to say, the two houses are perfectly free to exercise or to refrain from exercising them, in whole or in part. There are, however, some grants of power which are mandatory. For example, it is made the duty of Congress to call a convention of the states to revise the constitution whenever the legislatures of two-thirds of the states so request;<sup>1</sup> likewise to provide for taking the census every ten years,<sup>2</sup> and to make regulations for the carrying of appeals from the lower courts to the Supreme Court.<sup>3</sup> In none of these instances, however, is there any way in which Congress can be compelled to act if it fails to obey the constitutional injunction; neither the executive nor the judiciary has means of forcing the legislature to exercise a mandate of the constitution.<sup>4</sup> The sole remedy for dere-

<sup>1</sup> Art. V.<sup>2</sup> Art. I, § 2, cl. 3.<sup>3</sup> Art. III, § 2, cl. 2.<sup>4</sup> W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), I, 597.

liction lies with the electorate, and consists in choosing congressional majorities which will observe the constitution's requirements.<sup>1</sup>

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On the other hand, not only are the powers of Congress limited in a general way by the federal nature of our government, but the framers of the constitution took pains to include in the instrument a number of express restrictions on congressional legislative activity. Most of these restraints are enumerated in the ninth section of Article I, where one finds that the privilege of the writ of habeas corpus may be suspended only when the public safety requires it in time of rebellion or invasion; that no bill of attainder or ex post facto law may be passed; that no preference may be given through commercial regulations or revenue laws to the ports of one state over those of another; that vessels bound to or from one state shall not be obliged to take out clearance papers or pay duties in another; that money may be drawn from the public treasury only after appropriations thereof have been made by law; and that no titles of nobility may be granted.

Express  
prohibi-  
tions

Further limitations are found in other parts of the constitution. Thus Congress may alter the regulations prescribed by law in each state respecting the times, places, and manner of holding elections for senators and representatives, "*except as to the places of choosing senators.*"<sup>2</sup> Again, although the power of taxation given to the national government is very comprehensive, there are certain express and implied limitations upon its exercise, relating to direct, indirect, and export taxes. Furthermore, under the implied limitations upon the taxing power growing out of the federal nature of our government, Congress may not tax the essential governmental agencies of a state, including the salaries of state officials, steps in state judicial proceedings, and the property or borrowing power of a state or municipality.<sup>3</sup> Furthermore, in providing for the support of the army, Congress may not make appropriations from the national treasury for a longer period than two years.<sup>4</sup> By inserting in the constitution a definition of the crime of treason, the framers effectually prevented the legislative branch from extending the list

Other  
limitations

<sup>1</sup> It may be noted in this connection that Congress, like other legislative bodies, can pass no irrevocable act. Any measure put on the statute-book by one Congress is legally subject to removal therefrom, or to any amount of amendment, by any subsequent Congress. See T. M. Cooley, *Principles of Constitutional Law* (2nd ed.), 100-102.

<sup>2</sup> Art. I, § 4, cl. 1.

<sup>3</sup> W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), I, 165-182.

<sup>4</sup> Art. I, § 8, cl. 12.

of offenses which may be prosecuted as treason; and in declaring what shall be the punishment for treason, Congress is further restricted by the provision that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."<sup>1</sup>

Where there are express grants or express prohibitions or restrictions, the authority of Congress to legislate, or its lack of power to do so, is usually sufficiently clear. On many subjects, however, the authority, if possessed at all, must be derived by implication or inference from some of the powers which are granted in express terms. That legislative power may legitimately be derived in this manner, the constitution itself practically asserts in the "implied powers" clause, which gives Congress authority to "make all laws which shall be necessary and proper for carrying into execution" the powers expressly vested by the constitution in Congress or in any branch of the government.<sup>2</sup> Likewise, four of the last seven amendments expressly state that Congress shall have power to enforce them by "appropriate legislation."

It is the sharp differences of opinion over what measures may, and what ones may not, fairly be deemed "necessary and proper," or "appropriate" for carrying into effect the enumerated powers of the national government, that has made the powers of Congress "the great battle-ground of the constitution." "Around them have surged the legal combats of strict and broad construction, of tariff and taxation, of nullification, of secession, of the currency, and finally, of commercial regulation and corporation control."<sup>3</sup> The Supreme Court early adopted a very liberal interpretation of these phrases, to this general effect: if it can be shown that Congress has been given authority to deal with any specified subject, in exercising that authority Congress is free to select any means or instrumentalities whatsoever which are not prohibited by the constitution and are appropriate, and which are consistent with the letter and spirit of that instrument.<sup>4</sup> Furthermore, whether a given law is "necessary," within the meaning of the constitution, is a question for Congress alone to decide; the courts will not inquire into the degree of the alleged necessity. Illustrations of law passed under implied grants of legislative power include the acts which established a Bank of the United States in 1791 and in 1816, and created

<sup>1</sup> Art. III, § 3, cls. 1-2.

<sup>2</sup> Art. I, § 8, cl. 18.

<sup>3</sup> J. T. Young, *The New American Government and its Work* (rev. ed.), 132.

<sup>4</sup> *McCulloch v. Maryland*, 4 Wheaton 316 (1819). Cf. pp. 108-110 above.

the national banking system during the Civil War; the laws authorizing the issuance of "greenbacks" and making them legal tender in the payment of debts, and, more recently, the act creating the federal reserve system; acts establishing the postal savings and parcel-post systems; and the great variety of measures based on authority implied from the power to regulate foreign and interstate commerce, *e.g.*, acts fixing the rates and regulating the services of express, telegraph, telephone, and pipe-line companies, acts concerning safety appliances and workingmen's compensation, and the pure food and drugs acts.

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Moreover, the scope of congressional authority has been considerably widened by decisions of the Supreme Court which have held that it is not necessary for Congress to trace back every one of its powers to some single grant of authority, direct or implied, but that authority may be deduced from more than one of the specified powers, or from some or all of them combined.<sup>1</sup> Powers derived in this way are commonly called "resulting powers." The criminal code of the United States is a good illustration. The constitution gives the national government express power to punish only five crimes, *i.e.*, counterfeiting the securities and coin of the United States, felonies committed in the territories or on the high seas, offenses against the law of nations, and treason. But Congress unquestionably has the power to punish the violation of any national law and to protect prisoners in its custody, although such powers are neither expressly granted nor inferable from any single express grant in the constitution. Similarly, from the premise that in all matters pertaining to international relations the United States appears as a single sovereign state, and that upon it rests the duty of meeting all its international responsibilities, has been deduced the power of Congress to punish the counterfeiting in this country of the securities of foreign states, to annex by statute unoccupied territory, and to establish judicial tribunals in foreign lands.

Resulting  
powers

In recent years, the phrase "federal police power" has come into common use; and it calls, in this connection, for brief explanation. The police power has been defined as the power to restrict the rights of liberty and property in the interest of the public health, safety, morals, or general welfare. No such general police power is conferred upon Congress in the constitution, and the most common

Federal  
"police  
powers"

<sup>1</sup> *Cohens v. Virginia*, 6 Wheaton 264 (1821); W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), I, 76-84.

instances of its exercise are found in state legislation and municipal ordinances. Such police powers as Congress may be said to have are legally only special or peculiar forms of the exercise of some express or implied power, in which the protection of the public health, morals, safety, or general welfare is prominently involved. These "police powers" arise, as a rule, from the power to lay taxes, to establish post-offices and post-roads, or to regulate interstate commerce. Illustrations of powers springing from the last-mentioned source are the safety-appliance act, the employer's liability act, the law limiting the hours of labor of persons employed on interstate carriers, the meat inspection and pure food and drugs laws, the narcotics control act, the statute prohibiting the transportation of lottery tickets by interstate carriers, and the Mann white-slave act.<sup>1</sup>

Exclusive  
and con-  
current  
powers

The mere fact that Congress has been invested with authority to legislate upon a given subject does not necessarily mean that the states are thereby deprived of the right to legislate upon the same subject. Naturally, in all cases where the power has been expressly prohibited to the states in the constitution, as, for example, the coining of money and the laying of duties on imports,<sup>2</sup> Congress alone may legislate; and in such cases its power is said to be exclusive. Congress likewise has exclusive power in cases in which, from the nature of the power or from the nature of the subject to which the power relates, legislative power must necessarily be exercised by the national government—for example, naturalization and the regulation of foreign and interstate commerce.<sup>3</sup> But in practically all cases which do not fall within these two classes, Congress and the state legislatures are said to have concurrent or independent power; so that acts of Congress and state statutes relating to the same subject may be in full force at the same time. Thus, there may be both national and state management or supervision of congressional elections; and both Congress and the states may exercise the right to lay taxes upon the same property or incomes. A state law which is repugnant to the national law upon the same subject will, of course, have to yield to the latter. The phrase "concurrent power" is also used to denote certain powers which

<sup>1</sup> W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), II, Chaps. XLI, XLIV; C. K. Burdick, *The Law of the American Constitution*, 225-233; R. E. Cushman, *Studies in the Police Power of the National Government* (Minneapolis, 1920).

<sup>2</sup> Art. I, § 10, cls. 1-3.

<sup>3</sup> W. W. Willoughby, *op. cit.* (2nd ed.), I, 112-119; II, 638-647.

may be exercised by a state until Congress legislates on the subject. On bankruptcy, for example, each state is at liberty to pass its own laws, and these measures remain in full force and effect until Congress exercises its right (as, in point of fact, it has done) to legislate on that subject. When Congress acts, the state laws are suspended; although the mere repeal of the congressional statute would automatically revive them unless they had been repealed in the meantime by the state legislature.<sup>1</sup>

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While it is true that the national government in general, and Congress in particular, has only limited and enumerated powers, in time of war these powers have shown such astonishing capacity for expansion that grave doubts have arisen as to where national authority really begins and where it ends. Some people have even gone so far as to contend that in war-time the constitutional limitations upon this authority are partially or entirely suspended. It will be well, therefore, to take some notice of these remarkable and far-reaching "war powers."

War  
powers:

The defect of the government under the Articles of Confederation which came nearest to proving fatal was its inability to mobilize the full fighting strength and material resources of the country in prosecuting the final stages of the Revolutionary War. On several occasions, too, Congress found itself without authority, or the courage to assume authority, to use the national military forces to suppress internal disorders and insurrections.<sup>2</sup> This experience serves to explain why the preamble of our present constitution states that two of the principal objects sought in the adoption of the new instrument in 1787 were to "insure domestic tranquillity," and to "provide for the common defense." To secure those ends, very important and far-reaching powers were conferred, not only upon the president in his capacity as commander-in-chief of the army and navy,<sup>3</sup> but also upon Congress as the law-making, taxing, and appropriating organ of the national government.

Recent events connected with our participation in the World War have shown that there is practically no power over the lives and property of citizens, deemed necessary for the successful conduct of war, which has not been construed to be granted by the constitution, either in express terms or by implication. "The farmer's wheat. the housewife's sugar, coal at the mines, labor in the

Scope as  
shown  
during the  
World War

<sup>1</sup> See pp. 611-612 below.

<sup>2</sup> J. Fiske, *The Critical Period*, 147-153, 177-186.

<sup>3</sup> See pp. 293-295 above, and F. R. Black, "The Theory of the War Power under the Constitution," *Amer. Law Rev.*, LX, 31-66 (Jan.-Feb., 1926).

factories, ships at the wharves and on the high seas, trade with friendly countries, the vast national railway system, the banks and stores, private riches, lands and houses, all were mobilized and laid under whatever obligations the requirements of waging war made imperative. Never before were labor and capital, land and natural resources, so completely subjected to governmental authority in a common enterprise."<sup>1</sup> In brief, the powers of Congress with respect to the national defense were demonstrated to be practically unlimited, except by the provision that the president shall be commander-in-chief, and that appropriations for the army shall not be made for a longer period than two years.

1. Declara-  
tion of  
war

The constitutional provisions which made possible this remarkable and unprecedented exercise of the "war powers" of Congress can be indicated briefly. First, to Congress is given the right to "declare war."<sup>2</sup> In practice, this grant has been of less importance than was expected, because the president, by his conduct of foreign relations, may create a situation from which the nation cannot withdraw with honor or without serious loss of prestige; in such cases, Congress has little or no choice but to declare war.<sup>3</sup> Formal declarations of war, in the sense of announcing that hostilities will be begun, have been almost wholly lacking in our history. In most instances, the declaration has amounted to nothing more than the formal announcement that a state of war already existed. Such a declaration, however, has its value from a strictly legal point of view, in that it fixes the exact date from which the rights and liabilities incident to a state of war are to be reckoned. Whether this grant of authority to declare war carries with it, as a corollary, the right of Congress to declare the end of a state of war and the resumption of peaceful relations, was warmly and exhaustively debated in the sessions of Congress held in 1920 and 1921. Finally, more than two years after the signing of the armistice which marked the actual cessation of hostilities, a joint resolution was passed in July, 1921, declaring the war with the central European powers to be at an end.<sup>4</sup>

From the power to "raise and support armies" and to "pro-

<sup>1</sup> C. A. Beard, *American Government and Politics* (5th ed.), 360.

<sup>2</sup> Art. I, § 8, cl. 11. This clause also grants authority to issue letters of marque and reprisal, which, however, has been of no practical importance since the disappearance of privateering.

<sup>3</sup> See pp. 291-294 above.

<sup>4</sup> For full consideration of this matter, see J. M. Mathews, *Conduct of American Foreign Relations*, 328-336; E. S. Corwin, "The Power of Congress to Declare Peace," *Mich. Law Rev.*, XVIII, 669-675 (May, 1920).

vide and maintain a navy,"<sup>1</sup> supplemented by its authority over commerce and the power to tax, borrow, and appropriate, and by its direct and indirect control over the administrative agencies charged with the detailed conduct of war, Congress derives its authority to take whatever steps may be necessary to safeguard the nation in time of peace and to ensure the vigorous and effective carrying on of hostilities in time of war. Of the necessity and appropriateness of the means thus employed, Congress is practically the sole judge, being responsible for the proper exercise of these great powers primarily to the electorate rather than to the courts. There is even uncertainty as to just how far the guarantees of civil liberty, particularly freedom of speech and press, contained in the first ten amendments, impose restraints upon Congress in the exercise of its comprehensive war powers—at all events, restraints which can be enforced in the courts.<sup>2</sup>

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2. Provision and maintenance of military and naval establishments

During the World War, the war powers of Congress were successfully invoked to justify the enactment of two important classes of emergency laws.<sup>3</sup> One class of measures looked to the mobilization of all the human and natural resources of the country; the other class had for its object the prevention of interference with the conduct of the war. In the first group belong the selective draft acts of 1917 and 1918; a number of measures designed to protect the health and morals of the enlisted men; the civil relief acts, intended to prevent prejudice to the civil rights of persons in military service; the war-risks insurance act for the welfare of families of soldiers and sailors who died or were wounded in the service; laws stimulating the production of ships, munitions, food, and fuel; laws authorizing the president to take over and operate the great railway systems of the country; statutes creating a long list of boards and commissions charged with the supervision of essential industries and activities, or with the administration of some of the enactments just mentioned; and acts providing for the reorganiza-

Emergency laws, 1917-18

<sup>1</sup> Art. I, § 8, cls. 11-12.

<sup>2</sup> *Schenck v. U. S.*, 249 U. S. 47 (1919); *Abrams v. U. S.*, 250 U. S. 616 (1919); *Schaefer v. U. S.*, 251 U. S. 466 (1920); *Pierce v. U. S.*, 252 U. S. 239 (1920). In *U. S. v. Cohens Grocery Co.*, 255 U. S. 81 (1920), the Supreme Court held that the amended food control act was in conflict with the Fifth Amendment, and, in so holding, clearly stated that the guarantees and limitations of the Fifth and Sixth Amendments were not suspended or changed by the mere existence of a state of war. See T. F. Carroll, "Freedom of Speech and of the Press during the Civil War," *Va. Law Rev.*, IX, 516-551 (May, 1923).

<sup>3</sup> All of the laws mentioned in this paragraph are in *U. S. Compiled Statutes* (1918), pp. 427-465, 1681-1686.



tion of the administrative departments of the government so as to increase their efficiency. In the second group of measures, which had for their purpose the prevention of interference with the conduct of the war, are found, notably, the espionage act of June, 1917, and its supplement, the sedition act of May, 1918. These laws imposed restrictions upon freedom of speech and the press which, in the opinion of many able lawyers, were unconstitutional invasions of the sphere of liberty supposed to be reserved and safeguarded by the national bill of rights.<sup>1</sup> Other measures coming within this general class were the trading-with-the-enemy act of 1917 and the war-materials-destruction, or sabotage, act of April, 1918.

Congress has been given authority to prescribe "rules for the government and regulation of the land and naval forces"<sup>2</sup> and "rules concerning captures on land and water."<sup>3</sup> The rules which have thus been enacted for the army are called the "Articles of War,"<sup>4</sup> and those for the navy, the "Articles for the Government of the Navy;"<sup>5</sup> together, the two are known as the "Military Laws of the United States." They comprise the rules by which the respective powers and duties of officers and men in the military and naval service are determined and exercised, including the regulations governing the trial and punishment of infractions of military discipline and procedure of courts-martial in both the army and the navy. Courts of inquiry have also been provided for, in both the army and the navy, to investigate and report facts in cases referred to them; but, unless they have been specially required to do so, they are not permitted to express opinions as to the merits of the cases, or to make recommendations.<sup>6</sup>

Because of its inclusion in the article of the constitution which sets forth the organization and powers of Congress, lawyers have argued that Congress alone has the right to suspend the privilege of the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it."<sup>7</sup> In the case of John Merryman,

<sup>1</sup> Z. Chafee, *Freedom of Speech* (New York, 1920); C. H. Hough, "Law in War Time—1917," *Harvard Law Rev.*, XXXI, 692-701 (Mar., 1918).

<sup>2</sup> Art. I, § 8, cl. 14.

<sup>3</sup> Art. I, § 8, cl. 11.

<sup>4</sup> *U. S. Compiled Statutes* (1918), pp. 315-328; *ibid.* (1923), pp. 112-128; *Code of the Laws of the U. S.* (1926), pp. 227-241.

<sup>5</sup> *U. S. Compiled Statutes* (1918), pp. 388-396; *Code of the Laws of the U. S.* (1926), pp. 1154-1163.

<sup>6</sup> See E. B. Creecy, "Courts-Martial," *Amer. Jour. Crim. Law and Criminol.*, X, 202-207 (Aug., 1919).

<sup>7</sup> Art. I, § 9, cl. 12. The writ of habeas corpus is issued by a court, or by a single judge, upon petition of a person who deems himself to be illegally

arising in 1861 at the opening of the Civil War,<sup>1</sup> Chief Justice Taney held that the suspension of the privilege of the writ was a prerogative of Congress rather than of the executive; and at different times during the Civil War, Congress passed acts suspending the writ. President Lincoln, on the other hand, assumed that the right to suspend belonged to the executive, and acted in accordance with that view at the opening of the war and before Congress was convened in special session. In a message to Congress he vigorously defended the legality of his action; and Congress, in order to remove any question of legality, passed various acts of indemnity to meet the situation which had thus arisen.<sup>2</sup>

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XXIV

Congress may provide for as large a professional or standing army as it desires. Our traditions, however, in common with those of English-speaking peoples everywhere, are opposed to the maintenance of large standing armies in time of peace, and hence much attention has been given to the organization and training of volunteer militia, now known officially as the National Guard. The powers of Congress with respect to the militia are both explicit and extensive. Congress is expressly authorized to "provide for organizing, arming, and disciplining the militia," and it may provide for calling out the militia for three distinct purposes, namely, to execute the national laws, to suppress insurrections, and to repel invasions. Congress is also empowered to provide for governing such part of the militia as may be "employed in the service of the United States," although the appointment of the militia officers and the authority to train the militia in accordance with congressional regulations are expressly reserved to the states.<sup>3</sup> In exercising these broad powers, Congress has enacted numerous laws with

5. Regulation of the National Guard

held in confinement, or upon petition of some one in his behalf. The "privilege" of the writ lies in the opportunity it gives to such a person to have the court promptly investigate the legality of his confinement; if detention is shown to be without legal warrant, the court will order the petitioner's release. If, on the other hand, valid grounds for it are found, the party may be remanded to custody or released upon bail. The writ is of early English origin, and it issues from state, as well as from national, courts. Unlike the national constitution, a few of the state constitutions, *e.g.*, Oklahoma, declare that the privilege of the writ of habeas corpus shall never be suspended. See *In re Neagle*, 135 U. S. 1 (1890); A. C. McLaughlin and A. B. Hart, *Cyclo. Amer. Govt.*, II, 105-106.

<sup>1</sup> W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), III, 1614-1615.

<sup>2</sup> See p. 295 above. Cf. J. D. Richardson, *Messages and Papers of the Presidents*, VI, 25; S. G. Fisher, "Suspension of Habeas Corpus during the War of the Rebellion," *Polit. Sci. Quar.*, III, 454-488 (Sept., 1888); G. C. Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress* (Madison, 1907).

<sup>3</sup> Art. I, § 8, cls. 15-16.

a view to increasing the effectiveness of the National Guard and coördinating its organization, training, and equipment more and more closely with that of the regular army.<sup>1</sup>

6. Estab-  
lishment of  
military  
reserva-  
tions

Congress is also authorized to purchase sites within the states, with the consent of the legislatures thereof, for the erection of forts, magazines, arsenals, dockyards and other needful buildings; and over such "military reservations" it may exercise "exclusive legislation."<sup>2</sup>

7. Dis-  
trict of  
Columbia

The same clause of the constitution confers upon Congress the power to "exercise exclusive legislation in all cases whatsoever" over the District of Columbia, comprising some seventy square miles on the north bank of the Potomac and including the city of Washington. The District has no local legislature; Congress itself makes all laws, whether pertaining to administrative and judicial organization or to financial, educational, and similar affairs of the area. No governor or mayor or other single chief executive presides; for since 1878 executive authority has been vested in a commission of three persons, of whom two are appointed by the president and Senate from among the residents of the District for a three-year term, and a third is detailed by the president from the engineer corps of the army for an indefinite term. As a body, these three commissioners have extensive powers: they appoint to numerous important municipal positions; they have charge of police and fire protection, and make regulations for the protection of life, health and property; they supervise the local public utilities, including gas, electricity, telephones, transportation, and water-supply. Schools are under a board of education appointed by the judges of the supreme court of the District. A board of charities and the judges of a municipal court are appointed by the president. For more than forty years prior to 1920, the cost of the District government was divided equally between the national treasury and the tax-payers of the District. In that year, however, the policy was inaugurated of having the District pay sixty per cent; and since 1924, Congress has actually provided only between twenty and thirty per cent.<sup>3</sup>

<sup>1</sup> See pp. 293, 295 above; *U. S. Compiled Statutes* (1918), pp. 396-417; *ibid.* (1923), pp. 151-159; *Code of the Laws of the U. S.* (1926), pp. 1033-1046.

<sup>2</sup> Art. I, § 8, cl. 17.

<sup>3</sup> The House District of Columbia appropriation bill for 1931-32 carried a total of \$45,596,228, the federal government contributing only \$9,500,000 of this amount, or about twenty-one per cent. *Cf.* F. A. Fenning, "Federal Management of the Federal City," *Nat. Mun. Rev.*, XX, 16-18 (Jan., 1931).

Many of the half-million residents of the District retain a legal residence in some one of the states and may vote there, usually by mail. In the District itself, however, none—even though tax-payers—are voters; there are no locally elected officers, and the District as such has no part in choosing the president or members of Congress. Notwithstanding this denial of direct participation in their own government, “there is probably no municipal government in this country where the opinion of the individual citizen has more influence on local government.” The commissioners and the committees of Congress to which bills relating to District matters are referred hold hearings on every measure of local importance, and any person who desires to express an opinion is certain of consideration; and in 1926 the House committee on the District of Columbia invited a wider expression of popular views by adopting the practice of sending bills to a citizens’ advisory council representing numerous civic organizations in the District.<sup>1</sup>

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## CHAPTER XXV

### NATIONAL REVENUES

As a frame of government, the Articles of Confederation were fundamentally defective in that they gave Congress no dependable means of raising money. Congress was, indeed, authorized to make requisitions on the states, *i.e.*, to ask the state governments from time to time to turn over for national use funds raised by them within their several jurisdictions in such manner as they might adopt. But the national authorities had no way, other than the use of armed force, of compelling a state to heed the requests thus made; and in practice most states largely ignored or evaded them. Congress itself had absolutely no power to tax; it could not reach down past the state governments to the individual citizen, levy a money charge on his property or business or income, and enforce payment by seizing and selling the possessions of delinquents. Yet, as all experience shows, without this power, no government can, in the long run, exist. Two attempts were made, in 1781 and 1783, to amend the Articles so as to give Congress a restricted power to impose duties on imports. On the first occasion, however, Rhode Island, and on the second, New York, held out against the change, thereby (since unanimity was required for the adoption of amendments) preventing it from being made.<sup>1</sup>

Financial  
weakness  
of the  
Confedera-  
tion, 1781-  
1789

It is not to be wondered at, therefore, that the convention of 1787, called for the purpose of revising the Articles and rendering them "adequate to the exigencies of government," took it for granted from the first that, whatever else was done or not done, the national government was to be endowed with independent revenue-raising authority. And, very appropriately, the long list of powers given to Congress in the eighth section of the first article of the constitution starts off with the power "to lay and collect taxes, duties, imposts and excises." Under this grant, Congress raised by taxation, down to 1910, the sum of twenty billion dollars; under it, nearly seven billion dollars were raised in the single fiscal year ending June 30, 1920.

The tax-  
ing clause  
of the con-  
stitution

<sup>1</sup> G. T. Curtis, *Constitutional History of the United States* (rev. ed.), I, Chaps. VIII, X.

CHAP.  
XXVRestrictions  
on the  
national  
taxing  
power:1. Purposes  
of taxation

Comprehensive, however, as is the taxing power thus granted to the national government, taxes must be laid in accordance with several express or implied restrictions. Congress is not free, for example, to lay and collect taxes for any and all purposes whatsoever, but only "to pay the debts and provide for the common defense and general welfare of the United States." The first two purposes are definite enough; but the phrase "general welfare" is broad and loose, and as a restriction upon the taxing power it is not of great practical importance; it means merely that money raised by taxation may be appropriated only for public, as distinguished from private, purposes. If, therefore, Congress is satisfied that any public purpose—in other words, the *general* welfare—will be promoted by levying taxes, its judgment is final, and the validity of such taxes cannot, in general, be challenged; and there is no limit to the tax-rate that Congress may lawfully impose. Moreover, there is no restriction whatever on the power to incur indebtedness, although such indebtedness may have to be paid by taxation. Hence we find Congress promoting the "general welfare" by imposing taxes in aid of institutions of higher learning, although they are attended by only a comparatively small part of the population, for the assistance of "world's fairs" and similar expositions, for the maintenance of Yellowstone Park and other national parks in different sections of the country, for the protection of seals whose skins can be worn only by the well-to-do, for the preservation of game on a National Bison Range, for the construction of the Panama Canal and of enormous irrigation works in the western states, and for the erection of monuments to the memory of departed heroes and statesmen.

2. Apportionment  
of direct  
taxesDirect  
taxes  
defined

The taxing power is limited by the requirement that direct taxes shall be apportioned among the several states according to their population.<sup>1</sup> Congress first determines the total amount to be raised by direct taxation, and each state's quota is then fixed in proportion to its population and assessed upon the property of the individual citizen. The phrase "direct taxes" is not defined in the constitution, and long controversies arose out of this fact when it was desired to lay a tax on incomes. As defined in various decisions of the Supreme Court prior to 1895, the phrase included only poll or capitation taxes and taxes on real estate.<sup>2</sup> Direct taxes, in this

<sup>1</sup> Art. I, § 2, cl. 3.<sup>2</sup> *Hylton v. United States*, 3 Dallas 171 (1794); *Pacific Ins. Co. v. Soule*, 7 Wall. 433 (1868); *Veazie Bank v. Fenno*, 8 Wall. 533 (1869). See also

sense, have been levied on only five occasions, the last being in 1861, when a direct tax of twenty million dollars was laid on lands, improvements, and dwelling houses.<sup>1</sup> Economic conditions made this levy an anachronism; for wealth was not distributed according to population, and personal property had increased far more rapidly than real estate. The eastern manufacturing centers were, therefore, favored at the expense of the agricultural districts.

In 1862, Congress for the first time imposed a tax upon incomes, with certain exemptions. Assuming that an income tax was not a direct tax, it made no effort to apportion the tax among the states according to their population, but rather made the tax apply uniformly to the various classes affected by it. In a test case which eventually reached the Supreme Court, opponents of the law argued that an income tax was a direct tax, which required apportionment, and that therefore the law in question was unconstitutional.<sup>2</sup> Adhering, however, to the earlier judicial definitions of direct taxes, the court decided that an income tax is not a direct tax, and accordingly upheld the constitutionality of the law. Before the decision was rendered, the tax was, in point of fact, repealed by Congress. Some thirty years then passed. Finally, in 1894, Congress, acting under pressure from a small group of Populist members who then held the balance of power, levied another income tax.<sup>3</sup> This law did not differ essentially from that of 1862, and both Congress and the general public assumed that one was just as valid as the other. Nevertheless, it was challenged in the courts upon grounds similar to those urged against the constitutionality of the previous measure; and in 1895 the Supreme Court, reversing precedents of long standing, extended the meaning of "direct taxes" to cover taxes imposed on incomes derived both from land and from personal property, which must, therefore, in order to be constitutional, be apportioned according to population. Since the act in question levied the tax on a basis of uniformity, it was declared unconstitutional.<sup>4</sup>

C. J. Bullock, "The Origin, Purpose, and Effect of the Direct-Tax Clause in the Federal Constitution," *Polit. Sci. Quar.*, XV, 217-239, 452-484 (Sept.-June, 1900).

<sup>1</sup> Slaves had also been included under the laws of 1793, 1813, 1815, and 1816. A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, III, 508.

<sup>2</sup> *Springer v. United States*, 102 U. S. 586 (1880). See C. G. Tiedeman, "The Income Tax Decisions as an Object Lesson in Constitutional Construction," *Annals Amer. Acad. Polit. and Soc. Sci.*, VI, 268-279 (Sept., 1895).

<sup>3</sup> C. F. Dunbar, "The New Income Tax," *Quar. Jour. Econ.*, IX, 26-46 (Oct., 1894).

<sup>4</sup> *Pollock v. Farmer's Loan and Trust Co.*, 158 U. S. 601 (1895).



CHAP.  
XXVSixteenth  
Amend-  
ment

For this decision, the Supreme Court was roundly criticized on the stump and in the Democratic and Populist platforms in the presidential campaign of 1896. But nothing was done to remedy its effect—indeed, in the nature of the case little could be done—until in response to growing popular demand, and with a view to helping meet increasing burdens upon the treasury, Congress, in 1909, approved and referred to the states the Sixteenth Amendment, which, as we have seen, became effective in 1913.<sup>1</sup> Since that date, Congress has been permitted to “lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states.” The result is that taxes upon incomes from real and personal property, despite the decision of the Supreme Court rendered in 1895, continue to be classed as indirect or excise taxes. Congress is thus relieved from the necessity of apportioning such taxes according to population, a thing which would be quite impossible without inflicting grave injustice upon the people of some states.<sup>2</sup> Promptly upon the ratification of the Sixteenth Amendment, Congress passed the income tax law of 1913, which, with modifications, is still in force.<sup>3</sup> Indeed, it may safely be said that the taxation of incomes has become a permanent part of our national fiscal policy.

3. Uni-  
formity of  
indirect  
taxes

By far the greatest part of the national revenue has always come from indirect taxes, and in laying these Congress is restricted by the constitutional requirement that “all duties, imposts, and excises shall be uniform throughout the United States.”<sup>4</sup> This does not prevent a tax upon tobacco, for example, from falling more heavily upon sections where much tobacco is raised than upon others where little is raised; it merely means that all tobacco of a certain quality or weight shall be taxed at the same rate in all parts of the country; and that when duties are laid on imports, the rates upon any class of commodities shall be the same at Atlantic, Pacific, or any other, ports of entry. This requirement of uniformity does not apply, however, to goods coming into the country from Porto

<sup>1</sup> See pp. 165-166 above.

<sup>2</sup> *Brushaber v. Union Pacific R. R.*, 240 U. S. 1 (1916). The Sixteenth Amendment does not extend the taxing power of the national government to new sources. Any income that was exempt from taxation before the amendment—such as salaries of state officers—is still exempt. The amendment merely abolished apportionment. *Evans v. Gore*, 253 U. S. 245 (1920); *Miles v. Graham*, 268 U. S. 501 (1925).

<sup>3</sup> R. G. Blakey, “The New Income Tax,” *Amer. Econ. Rev.*, IV, 25-36 (Mar., 1914); R. H. Montgomery, “Our Bungling Income Tax Law,” *World's Work*, LIII, 501-510 (Mar., 1927).

<sup>4</sup> Art. I, § 8, cl. 1.

Rico or the Philippines; they may be taxed at rates different from those which apply to imports from foreign lands. Under the decisions of the courts, Congress is free to impose such duties as it sees fit upon commodities coming from the insular dependencies.<sup>1</sup>

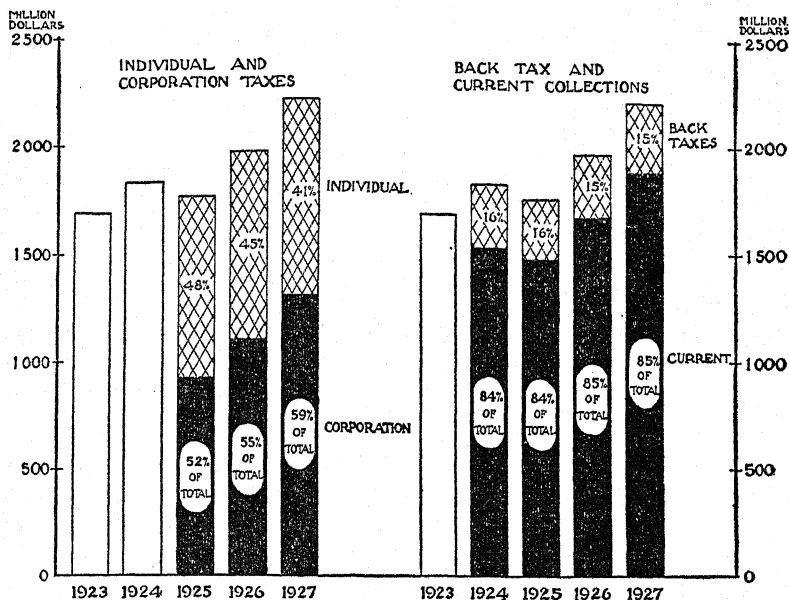
Other restrictions upon the taxing power of the national government are to be found (a) in the constitutional provision which for-

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XXV

Other  
limitations

## INCOME TAX COLLECTIONS



Income tax collections for the fiscal years 1923 to 1927, distributed according to individual and corporation taxes and according to back taxes and current collections. (The former distribution was not made until 1925 and the latter until 1924.)

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bids the laying of duties upon exports, although Congress is authorized to regulate export trade in every way save by taxation; (b) in the implied limitation arising from the nature of the federal union, as previously explained, which prevents Congress from taxing the property or the essential governmental functions of the several state governments and of municipalities created by them, including the salaries of state and local officials;<sup>2</sup> and (c) in the principle

<sup>1</sup> *De Lima v. Bidwell*, 182 U. S. 1 (1901); *Downes v. Bidwell*, 182 U. S. 244 (1901); *Dooley v. United States*, 182 U. S. 222 (1901).

<sup>2</sup> *Collector v. Day*, 11 Wall. 113 (1870). The language of the Sixteenth Amendment seems broad enough to cover taxes on the salaries of state and

recently laid down by the Supreme Court to the effect that Congress may not use its taxing power merely to regulate matters, such as manufacturing, whose regulation has been reserved to the states.<sup>1</sup>

Except as restricted in the foregoing ways, Congress is free to select any or all objects or persons to be subject to taxation, and is absolutely untrammelled by constitutional limitations in determining the amount which shall be raised by various kinds of taxes. If it can be shown that Congress has the authority to tax any class of persons or articles at all, the determination of the amount, as well as the expediency, of the tax rests with Congress alone; and the remedy for excessive or inequitable taxation lies, not with the courts, but with the electorate. Most laws imposing taxation can readily be classed as revenue laws, *i.e.*, laws in which the primary, if not the sole, purpose is to produce income for the government.<sup>2</sup> There are measures, however, which—although tax laws in form—aim only incidentally to bring in revenue; thus, tariff schedules designed to protect American industries against foreign competition often carry rates too high to be productive. Indeed, Congress has at times gone so far as to impose taxes with the avowed purpose of destroying a business. Thus, in order to give national banks a monopoly of the business of issuing bank notes, a tax of ten per cent was laid in 1866 on the notes issued by state banks; in other words, state bank notes were taxed out of existence.<sup>3</sup> Such laws have been sustained on the ground that Congress has the right to impose taxes as a means of rendering effective some expressly granted power, for example, the regulation of commerce or of the coinage.

local officers, but the Supreme Court has held that the amendment does not extend the taxing power of Congress to such new or excepted subjects. More recently, the Court has also held that a general tax on incomes does not apply to the salaries of federal judges, because that would constitute a diminution of their compensation, which is prohibited by Art. III, § 1, of the constitution. The same principle exempts the president's salary from taxation if the tax is imposed after he takes office; on the other hand, if the tax is imposed before he takes office, he cannot benefit by its repeal unless re-elected thereafter, in view of Art. II, § 1, cl. 7. See *Evans v. Gore*, 252 U. S. 245 (1920), and comments in *Amer. Polit. Sci. Rev.*, XIV, 641-643 (Nov., 1920); E. S. Corwin, "Constitutional Tax Exemption—the Power of Congress to Tax Income from State and Municipal Bonds," *Nat. Mun. Rev.*, XIII, Supp., 51-67 (Jan., 1924).

<sup>1</sup> In *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922), denying the constitutionality of the child labor tax of 1919.

<sup>2</sup> In the corporation, income, and inheritance taxes of the past decade, it is easy to discern, along with the fiscal motive, the purpose to reduce the size of "swollen fortunes" and to bring about some readjustment of the national tax burden.

<sup>3</sup> *Veazie Bank v. Fenno*, 8 Wall. 553 (1869).

But is a tax constitutional when it is not clearly either a revenue measure or a means of rendering effective some other delegated power? This question was raised by the law of 1902 laying a prohibitive tax upon oleomargarine,<sup>1</sup> by the act of 1912 placing a similar tax upon the manufacture of poisonous phosphorus matches,<sup>2</sup> by the narcotics drug laws of 1914 and 1919 imposing a tax upon registered dealers,<sup>3</sup> and by the law of 1919 laying a special tax on the incomes of concerns employing children under the age of sixteen.<sup>4</sup> In cases coming before it at different times, the Supreme Court upheld both the oleomargarine and the narcotics law as revenue measures, refusing to inquire into the legislative motive.<sup>5</sup> The constitutionality of the phosphorus match law has never been judicially tested. But when the child labor law was challenged, the Supreme Court for the first time took into account the real motive animating Congress, and made such motive a test of legislative action. Refusing to look upon the law as a revenue measure, the Court viewed it as an attempt by Congress to bring within its control, by means of the taxing power, matters normally falling to the states alone to regulate; and for this reason the measure was held not to be a valid exercise of the taxing power.<sup>6</sup>

Of the total revenue collected by the national government between 1789 and 1910, only a relatively small portion, namely, about twenty-eight million dollars, came from direct taxes; and after the Civil War that form of taxation was left entirely to the states, at all events until the enactment of the federal income tax law of 1913.<sup>7</sup> During the same period, customs duties on imports yielded more than eleven billion dollars, and excise taxes, chiefly on liquors and tobacco, produced eight and one-half billions—a total from indirect taxation of about ninety-six per cent of the entire national income. The first taxes laid by the new government under the con-

Yield of  
direct and  
indirect  
taxesCustoms  
duties

<sup>1</sup> *U. S. Compiled Statutes* (1918), pp. 987-991; *Code of the Laws of the U. S.* (1926), p. 777.

<sup>2</sup> *U. S. Compiled Statutes* (1918), pp. 994-995; *Code of the Laws of the U. S.* (1926), p. 783.

<sup>3</sup> *U. S. Compiled Statutes* (1918), pp. 996-998; (1923), pp. 591-593; *Code of the Laws of the U. S.* (1926), p. 742.

<sup>4</sup> *U. S. Compiled Statutes* (1923), pp. 451-452.

<sup>5</sup> *McCray v. United States*, 195 U. S. 27 (1904); *United States v. Doremus*, 249 U. S. 86 (1919); *Nigro v. U. S.*, 276 U. S. 332 (1928). See also *Amer. Polit. Sci. Rev.*, XXIII, 78-81 (Feb., 1929).

<sup>6</sup> *Bailey v. Drexel Furniture Co.*, 259 U. S. 20 (1922). For critical reviews of this decision, see *Amer. Polit. Sci. Rev.*, XVI, 612-616 (Nov., 1922); *New Republic*, XXXI, 177-179, 248-250 (July 12 and 26, 1922). Cf. J. R. Long, "Federal Police Regulation by Taxation," *Va. Law Rev.*, IX, 81-97 (Dec., 1922).

<sup>7</sup> See pp. 541-542 above.

stitution were duties on imports, and down to the Civil War such duties formed the most important single source of revenue. The falling off in their yield at the beginning of that conflict, however, together with the extraordinary demands made upon the national treasury throughout the struggle, compelled Congress in 1862 to resort to excise, or internal revenue, taxes, which, until then, had been employed only twice<sup>1</sup> and on a modest scale.<sup>2</sup> Not only were liquors and tobacco taxed heavily, but license fees were required of persons engaged in certain occupations, and taxes were for the first time imposed on incomes. Furthermore, not only were finished products taxed, but also the various stages and materials of manufacture, for example, bolts, castings, trimmings, etc., used in steam engines, and the paper, cloth, leather, boards, thread, glue, gold-leaf, and type-material which went into the manufacture of a book. Stamp taxes, too, were imposed on commercial paper, insurance policies, deeds, mortgages, and other documents.<sup>3</sup> Indeed, any student of our national tax policy in the Civil War era will have no difficulty in seeing where Congress found precedents for many of the extraordinary excise taxes laid during the Spanish-American War in 1898,<sup>4</sup> and especially during our participation in the World War in 1917-18.

At no time after the Civil War was it deemed feasible to dispense with excise taxes; on the contrary, they established themselves as a permanent part of our fiscal system and continued to yield varying proportions of the total national revenue. By successive acts in and after 1866, Congress, indeed, remitted the taxes on many articles and processes; and eventually the only things taxed were certain luxuries, chiefly liquors and tobacco. Mounting revenues and treasury surpluses after 1880 led extreme protectionists to urge that even these taxes be abolished; but the only action taken was to reduce the rates; and the Spanish-American War ended all talk of dispensing with the excise system completely. Within a decade, indeed, Congress, far from abolishing the system, extended it to new fields, with a view to obtaining increased revenue with which to meet the again rapidly mounting expenses

<sup>1</sup> In 1791-1802 and 1813-1818.

<sup>2</sup> It must be observed, of course, that the government has never been entirely dependent on the proceeds of taxation. The income from the sale of public lands, for example, was for many years large.

<sup>3</sup> A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, III, 212. See also H. E. Smith, *The United States Federal Internal Tax History from 1861 to 1881* (Boston, 1914).

<sup>4</sup> C. C. Piehn, *Finances of the United States in the Spanish War* (Berkeley, 1898).

of the government, and also as a "weapon to compel economic readjustments."

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XXV

New taxes

In 1909, for example, a tax was imposed on the net income or profits of practically all corporations organized for profit;<sup>1</sup> and after the ratification of the Sixteenth Amendment in 1913, a tax was laid on all private incomes above stated amounts. The outbreak of the war in Europe in 1914 reduced receipts from customs, and at the same time made new and heavy expenditures imperative. Accordingly, excise duties were increased; license taxes were imposed on business and amusement establishments; stamp taxes were laid on insurance policies, telegraph messages, etc.; and in 1916 the fourth progressive inheritance tax in our history was adopted.<sup>2</sup> Our actual participation in the war in 1917-18 naturally entailed an unprecedented increase in the range and amount of taxation.<sup>3</sup> All existing tax rates were raised, and an immense number of persons, occupations, products, and manufactures that had been exempt were now obliged to contribute to the support of the government in its great enterprise. Of these newer taxes, the most important were a heavy and progressive tax upon excess profits, suggested by the recent experiences of our associates in the European struggle, and greatly increased rates on incomes and inheritances. Since the end of the war, it has been found possible to remit a few taxes altogether and to lower the rates of many others. The enormously increased national debt, together with continued expansion of governmental activity in various directions, will probably serve to keep taxation for some years to come at a considerably higher level than in the years preceding the World War.

Inasmuch as both Congress and the states may tax the same persons or property at the same time, there has always been a possibility of double taxation. Except in war-times, however, Congress has confined national taxation mainly to import duties<sup>4</sup> and

Double  
taxation

<sup>1</sup> C. A. Conant, "The New Corporation Tax," *No. Amer. Rev.*, CXC, 231-240 (Aug., 1909).

<sup>2</sup> Inheritance tax laws were passed in 1797 (repealed in 1802), 1862 (repealed in 1870), and 1898 (repealed in 1902). "These were strictly legacy taxes, however, on personal estates, with the exception of the 'succession tax' on real property levied in 1864 and repealed in 1870." *Amer. Year Book* (1916), 351. See M. H. Hunter, "The Inheritance Tax," *Annals Amer. Acad. Polit. and Soc. Sci.*, XCV, 165-180 (May, 1921).

<sup>3</sup> E. R. Seligman, "The War Revenue Act," *Polit. Sci. Quar.*, XXXIII, 1-37 (Mar., 1918); F. W. Taussig, "The War Revenue Act of 1917," *Quar. Jour. Econ.*, XXXII, 1-37 (Nov., 1917); R. G. Blakey, "The War Revenue Act of 1917," *Amer. Econ. Rev.*, VII, 791-815 (Dec., 1917); R. M. Haig, "The Revenue Act of 1918," *Polit. Sci. Quar.*, XXXIV, 369-391 (Sept., 1919).

<sup>4</sup> Congress has practically exclusive power to tax imports and lay tonnage duties, in view of the restrictions on the states in these matters. See Art. I, § 10, cl. 2.

a few excise taxes, thus leaving to the states almost a monopoly of the taxation of real estate, personal property, corporations, incomes, and inheritances. With the enactment of the national corporation tax in 1909, the income tax in 1913, and the progressive inheritance tax in 1916, however, and the marked extension of the list of kinds of personal property subject to excise taxes, the amount of double taxation has been greatly increased. As a result, problems of the utmost importance and of great intricacy have arisen; and the determination of the proper spheres of the national and state governments, respectively, in the taxation of coming years promises to be no easy task.

The receipts of the government from all sources during the fiscal year ending June 30, 1930, aggregated \$8,602,505,815. Of this huge sum, however, only \$4,177,941,702 is classed as "ordinary receipts"—a term which covers customs duties, income and profit taxes, miscellaneous internal revenue, proceeds from foreign obligations owned by the government, and numerous miscellaneous items.<sup>1</sup> The following table<sup>2</sup> shows the principal sources of national income, and incidentally discloses the chief subjects of national taxation:

Public debt receipts .....		\$3,722,970,171
Postal revenue .....		705,484,098
Customs duties .....		584,771,315
Internal revenue taxes .....		3,038,682,282
Made up in part of		
Taxes on incomes and profits .....	\$2,410,259,230	
Inheritance (estates) taxes .....	64,769,625	
Taxes on distilled spirits .....	11,695,267	
Tobacco and its manufactures .....	450,339,060	
Manufacturers' and dealers' sales .....	2,676,261	
Capital stock sales or transfers .....	46,698,226	
Oleomargarine taxes .....	3,919,387	
Admissions to amusements .....	4,230,667	
Club dues tax .....	12,521,091	
Miscellaneous sources .....		550,597,945
Made up in part of		
Sales of war supplies .....	1,950,575	
Sale of miscellaneous government property .....	3,254,203	
Sale of government services .....	3,338,414	
Profits on coinage .....	8,321,544	
Collections under prohibition laws .....	1,105,171	
Immigration head-tax .....	2,722,898	
Obligations of foreign governments		
Principal .....	97,634,287	
Interest .....	141,931,519	
District of Columbia .....	32,891,420	
Railroad securities .....	11,485,514	
Panama Canal tolls, etc. ....	27,810,231	

<sup>1</sup> For details, see *Annual Report of the Secretary of the Treasury* (1930).

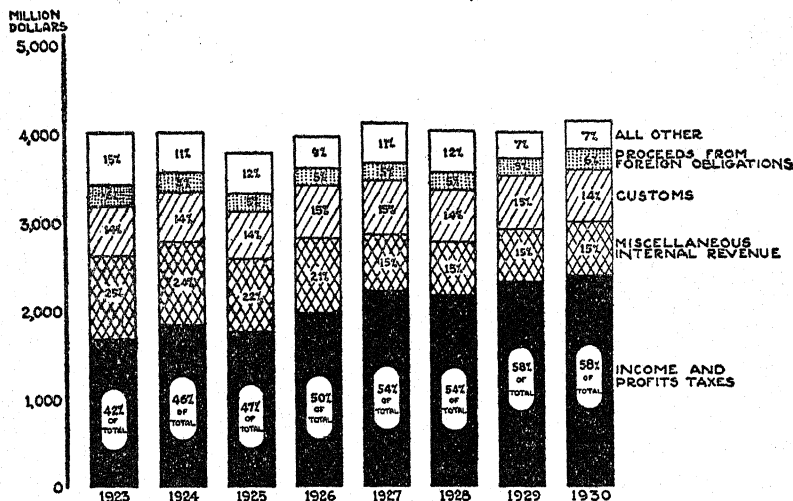
<sup>2</sup> Compiled from *ibid.*

Most of the national revenue is collected under the general supervision of the secretary of the treasury, by one or the other of two branches of that department, namely, the customs and internal revenue services.<sup>1</sup> For the collection of customs duties, the country has been divided into forty-eight collection districts, each containing a main port of entry in charge of a collector or deputy collector of customs, who is regularly a political appointee. Duties may be paid at any one of a total of more than three hundred

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Collection  
of revenue  
1. Customs  
duties

ORDINARY RECEIPTS, 1923-1930



Principal sources of ordinary receipts for the fiscal years 1923 to 1930.

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main and subsidiary "ports of entry," all located on the Pacific and Atlantic coasts, on or near the Canadian and Mexican borders, or in Alaska, Hawaii, and Porto Rico; a port of entry being officially defined as a place "at which a customs officer is stationed with authority to enter and clear vessels and collect duties on imports."<sup>2</sup> The internal revenue service is in charge of a commissioner of internal revenue, under whom is a staff of several thousand officials engaged in the collection of the various internal revenue taxes. The country is divided for this purpose into sixty-

2. Internal  
revenue

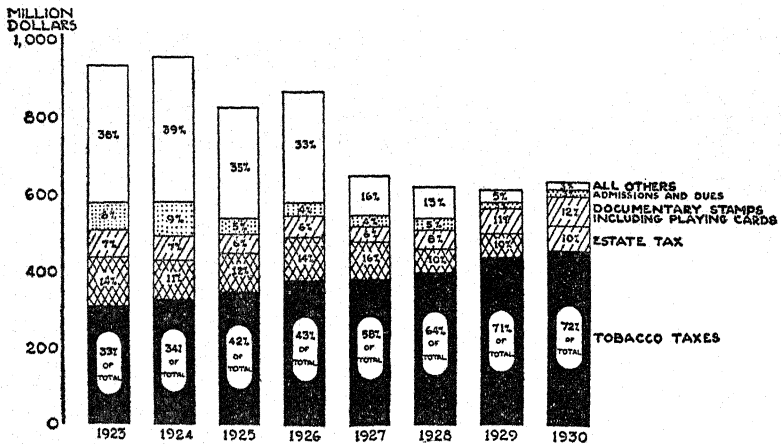
<sup>1</sup> L. F. Schmeckebier, "The Customs Service," *Service Monograph* No. 33 (Baltimore, 1924); L. F. Schmeckebier and F. X. A. Eble, "The Bureau of Internal Revenue," *ibid.*, No. 25 (1923).

<sup>2</sup> See *Customs Regulations of the United States*, issued at frequent intervals by the Treasury Department.



four districts, each with a collector of internal revenue and a large number of deputy collectors. The latter have at times been selected in accordance with merit rules, and at other times have been political appointees; the collectors themselves have never been put on the merit basis.<sup>1</sup> The work of these collectors and their assistants includes not only the gathering of the regular excise taxes, *e.g.*, on tobacco, but the collection of the corporation and income taxes as well. Formerly, the collection of the national revenues was to a

INTERNAL REVENUE RECEIPTS, 1923-1930



Principal sources of miscellaneous internal revenue collections for the fiscal years, 1923 to 1930.

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large extent automatic. That is to say, foreign goods could not be imported, and domestic goods subject to taxation could not be manufactured or sold, until the importer, manufacturer, or dealer had paid whatever taxes were due. In the case of importations, cash payments prevailed; in the case of excises, the method was mainly that of the sale of stamps or licenses. Beginning with the corporation tax law of 1909, however, other and more complicated methods have been introduced, although the customs and ordinary internal taxes continue to be gathered as before. The collection of the personal and corporate income taxes, and of the inheritance and excess profits taxes, is based upon sworn statements of the tax-

<sup>1</sup> See "Reasons Why Deputy Collectors of Internal Revenue Should be Classified," in *42nd Annual Report U. S. Civil Service Commission* (1925), pp. xxvi-xxix.

paying individual or corporation. Such statements may be evaded or falsified, and consequently much time and energy must be given by the revenue authorities to investigative work. Any statement may be challenged and minutely inquired into if the revenue officers have reason to doubt its accuracy or completeness.

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Of course not all of the national income is collected by the customs and internal revenue services. Large amounts accrue every year in the form of postal revenues, income from the mint, fees for patents, copyrights, steamboat and other licenses not classed as excise taxes, proceeds of the sale of government property, especially public lands and war supplies, and the yield of fees and fines in the courts. All of these moneys are collected directly by the various agencies concerned, and, like the proceeds of the customs and internal revenue, are turned into the general treasury.

3. Miscel-  
laneous  
revenues

The treasury of the United States is located at Washington, where there are vaults specially constructed for the keeping of the money and securities of the government. Formerly, large portions of the revenue collected were deposited in one or another of nine sub-treasuries, situated in principal cities throughout the country, and money was paid out from these sub-treasuries on proper warrant.<sup>1</sup> The secretary of the treasury is, however, authorized to designate various national banks as depositories and to place national funds in their keeping, provided they make a deposit with him of government bonds or other satisfactory securities; and upon the expansion of the national banking system by the creation of the federal reserve banks in 1913,<sup>2</sup> this practice was so broadened as to lead, in 1921, to the abandonment of the sub-treasuries altogether. The government's money is now kept principally, therefore, in the federal reserve banks, together with a reduced number of ordinary national banks, and is paid out from them on warrants properly issued and attested.<sup>3</sup>

Treasury  
system

All laws for raising revenue are required to originate in the House of Representatives. The framers of the constitution manifestly intended that the House, whose members alone were chosen directly by the electorate, should control the national purse, after

Origin and  
enactment  
of revenue  
laws

<sup>1</sup> M. L. Muhleman, *The Treasury System of the United States* (New York, 1907).

<sup>2</sup> See p. 567 below.

<sup>3</sup> On the history of the independent treasury system, see D. Kinley, *History, Organization, and Influence of the Independent Treasury of the United States* (New York, 1893); and "The Independent Treasury of the United States and its Relations to the Banks of the Country," 61st Cong., 2nd Sess., Sen. Doc. No. 587 (1910).

the general manner of the House of Commons in England. The matter, however, has not worked out wholly in this way. All of the great revenue bills, as also the annual appropriation bills, are, indeed, first introduced in the House. But the Senate has unlimited power of amendment, and in practice most revenue bills are extensively and permanently reconstructed at the hands of that body. There is nothing to prevent the upper house from adding an amendment to a House revenue bill striking out all parts after the enacting clause and inserting an entirely new bill; and something of the sort has happened on several occasions, notably in 1872, when a House bill of only a few lines and affecting the duties on only two commodities was amended in the Senate into a measure covering twenty printed pages and comprising an extended revision of the tariff; and again in 1888-89, when a House bill to reduce taxation and reorganize revenue collection was transformed by the upper house into a general revision of both customs duties and internal taxes.<sup>1</sup> Indeed, a bill which is in effect, and even almost in technical form, a bill to raise revenue may be passed in the Senate before the House has taken any action in the matter at all, as was, for example, a postal salary and rate bill in January, 1925.<sup>2</sup> In 1926, Congress created a new agency for the preparation of the revenue act of 1928. This took the form of a joint bipartisan commission consisting of five members of the Senate committee on finance and five members of the House ways and means committee. Upon this commission was imposed the duty (a) of investigating the operation, effect, and administration of the federal system of internal revenue taxes, and of measures and methods for the simplification of such taxes, especially the income tax, and (b) of reporting to their respective houses before December 31, 1927.<sup>3</sup>

With the exception of the internal revenue acts, the most important revenue measures, under normal conditions, are the laws commonly known as tariff acts, which prescribe the duties to be imposed upon articles imported from other countries. In the tariff

<sup>1</sup> A. M. Low, "The Usurped Power of the Senate," *Amer. Polit. Sci. Rev.*, I. 1-16 (Nov., 1906). Cf. P. S. Reinsch, *American Legislatures and Legislative Methods*, 108-112.

<sup>2</sup> The primary purpose of this measure was, indeed, to increase the compensation of certain classes of postal employees. But in order to secure the necessary funds, postal rates on various kinds of mail matter were pushed upwards. After conference, the bill became law with the approval of the president. See p. 354 above.

<sup>3</sup> *Code of the Laws of the U. S.* (1926). The various hearings held by this commission in the course of its investigation are reported at length in *U. S. Daily*, beginning with the issue for October 31, 1927.

acts of 1909 and 1913, the numerous articles subject to duty were grouped together in fourteen different "schedules," lettered from "A" to "N" inclusive; but in the acts of 1922 and 1930, the schedules are numbered instead of lettered.<sup>1</sup> Following the schedules is usually a list of articles placed on the free list. These acts also include elaborate provisions for their administration or enforcement. Sometimes, too, a tariff act contains sections imposing internal taxes, or excises, of one kind or another. For example, the act of 1909 provided for a tax on the net income of corporations, and that of 1913 included the income tax law of that year. As a rule, however, internal revenue taxes have been imposed in laws which are separate from any tariff act, *e.g.*, the emergency revenue act of 1914 and the revenue acts of 1917 and 1921.

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The framing of a tariff bill, or of any other revenue measure, is the peculiar function of the committee on ways and means of the House of Representatives. Because of the political importance of all such measures, especially tariff bills, this committee and the corresponding Senate committee on finance have come to be second in importance to no other strictly legislative committees. The ways and means committee consists of twenty-five members (1931), fifteen belonging to the majority party and the rest to the minority party.<sup>2</sup> In the framing of tariff bills, the minority members of the committee have little or no influence. The majority members are divided into a number of sub-committees, each of which is charged with the preparation of some portion of the bill; and their work is whipped into final shape by the majority generally. During the preparation of the bill, public hearings may be held for the purpose of gathering information; and lobbyists, representing the varied special interests which are likely to be benefited or affected adversely by tariff changes, are actively engaged in attempts to influence the action of majority members of the committee.<sup>3</sup> There

Framing  
tariff bills

1. In com-  
mittee

<sup>1</sup> *U. S. Compiled Statutes* (1923), pp. 289-360; *Code of the Laws of the U. S.* (1926), pp. 534-581. The full text of the act of 1930 will be found in *U. S. Daily, Supp.*, June 16, 1930.

<sup>2</sup> Before the Civil War, some of the secretaries of the treasury took such a leading part, along with the committees on ways and means, in the framing of tariff measures as to give their names to certain of the resulting acts. Thus we have the Dallas act of 1816 and the Walker tariff of 1846. In later decades, however, most tariff measures have been called by the names of the chairmen of the committees responsible for them, as the McKinley bill of 1890, the Wilson-Gorman act of 1894, the Dingley act of 1897, the Payne-Aldrich act of 1909, the Underwood tariff of 1913, the Fordney-McCumber act of 1922, and the Hawley-Smoot act of 1930.

<sup>3</sup> An extended congressional investigation of lobbying was in progress while the tariff law of 1930 was pending before Congress. Consult files of the

have been instances in which certain schedules were largely prepared outside of the committee by the representatives of industries peculiarly interested in them—notably schedules dealing with steel and wool—and were accepted by the committee practically unchanged.<sup>1</sup>

2. In the  
houses

After the majority members of the committee have come to an agreement upon the final form of the bill, the minority members are called in, so that a formal vote of the entire committee may be had upon the measure. Thereupon the bill is reported to the House,<sup>2</sup> where it is almost certain to become the most important subject of debate during the session. The minority is usually given time in which to express dissent and criticism, but is seldom in a position to force any important changes if the bill, as almost invariably happens, is made a party measure. Having passed the House, the measure goes to the Senate, which may pass it with only slight changes or may alter it almost beyond recognition.<sup>3</sup> If important changes are introduced, the bill goes back to the House and is immediately referred to a conference committee representing both houses, which endeavors to effect a compromise. Whatever is agreed to by this conference committee, working in secret, is almost certain to pass both houses. In other words, opportunity is here offered for the insertion of important and far-reaching changes, not contemplated in the original or amended bill, at a time when it is usually too late for them to be considered by either house.<sup>4</sup>

*U. S. Daily*, for October, November, and December, 1929, and the *Readers' Guide to Periodical Literature*.

<sup>1</sup> Cf. C. A. Beard, "Whom Does Congress Represent?," *Harper's Mag.*, CLX, 144-152 (Jan., 1930).

<sup>2</sup> In 1913, the Underwood bill was first debated in the Democratic caucus before being reported to the House.

<sup>3</sup> Usually the Senate, through its finance committee, will have been working on a bill of its own; and large portions of this measure may be injected into the House bill. In 1909, the Senate adopted a bill of its own, as a substitute for the Payne bill which came up from the House, and the resulting Payne-Aldrich act was a fusion of the two measures, worked out in conference committee. Of the 674 Senate amendments to the Underwood tariff bill of 1913, 426 were accepted without change by the House. "The permanent tariff law of 1922 was reported to the Senate with 2,428 amendments, and in the final compromise the House yielded thirty times to the Senate's once." L. Rogers, *The American Senate*, 111.

<sup>4</sup> The time consumed in framing and enacting the Hawley-Smoot tariff of 1930 seems to have broken all records, at least since the Civil War. From the beginning of hearings to the final vote, a period of about eighteen months elapsed. Hearings before the committee on ways and means began early in January, 1929. In April, Congress was called in special session to consider a "limited revision" of the tariff. By May 28, the House had passed a tariff bill and sent it to the Senate. On November 22, the extra session ended, with the bill still before the Senate. On December 2, the regular session resumed

From these facts it is apparent that the fixing of responsibility for national tax legislation is no easy matter. Certainly, praise or blame cannot be concentrated on any single officer like the Chancellor of the Exchequer in England; rather, responsibility is divided, scattered, diffused. Each house shares it. But who among the five-hundred-odd members can be held to a strict accountability, especially when the final decisions of the powerful committees in charge of such measures are arrived at in secret? The general public, which is seldom adequately represented before these committees, has, in the past decade or two, come to look more and more to the president to interpose in its behalf his commanding influence as chief executive and as leader of his party.

Tariff-making presents great difficulties, technical, economic, and political. The schedules have become exceedingly intricate—indeed, a veritable labyrinth, or jungle—so that even the most conscientious congressman knows the merits of hardly more than a small fraction of the provisions on which he is expected to vote. This fact has convinced many people, including members of Congress and four recent presidents, that the old type of tariff legislation, carried on largely in a partisan spirit, and in ignorance of the conditions involved, by small groups of members of Congress acting under the spur of special interests, ought to give place to legislation based upon scientifically ascertained and up-to-date information, which shall always be available for framers of tariff bills and for members of Congress generally. Furthermore, a rigid schedule of customs duties suitable for to-day's needs may soon prove a misfit, because of rapidly changing economic conditions. Some measure of flexibility in tariff legislation is therefore desirable, so that rates may be easily adjusted to changing circumstances

consideration of the bill. On March 22, 1930, the bill passed the Senate with 1,253 amendments. Proceedings before conference committees and debates upon the floor of both houses delayed the final passage of the bill until June 14.

Commenting upon the "painstaking and conscientious effort" that had gone into the enactment of this bill, the vice-chairman of the Tariff Commission stated that "the new tariff bill includes over 20,000 distinct items. Four and one-half million words have been officially spoken in the Senate alone. The debates fill 2,800 pages in the *Congressional Record*. Eleven hundred and thirty-one witnesses were heard by the House ways and means committee, and 1,232 by the Senate finance committee. It took 18,000 closely printed pages to contain the information and argument submitted by interested parties. Printed data furnished by the Tariff Commission ran to 2,750 pages, with as much more information contributed in special reports by the individual experts of the Commission. The material contributed to the making of the new bill would fill two sets of the *Encyclopædia Britannica* of twenty-four volumes each, running one thousand pages to the volume." A. P. Dennis, *U. S. Daily*, March 29, 1930.

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XXV

Absence  
of respon-  
sibility

New  
factors in  
tariff  
legislation

without entailing wholesale revision by Congress. To meet these needs—scientifically obtained and up-to-date information, and a degree of flexibility—Congress, in 1916, created the United States Tariff Commission to serve as a fact-finding body; and in 1922 it empowered the president, after investigation and recommendation by the Tariff Commission in particular cases, to adjust individual tariff rates upward or downward, and even to change the classification of articles or the basis of assessing certain duties—with the single limitation that no rate may be increased or decreased more than fifty per cent of the figure specified in the law.

The Tariff Commission is one of the detached administrative agencies of the government, lying wholly outside of any executive department. It consists of six members representing the two major political parties, appointed by the president and Senate for six-year (originally twelve-year) terms.<sup>1</sup> Under the original law and the amendments of 1922 and 1930,<sup>2</sup> the work of the Commission consists chiefly in investigating (1) the administrative, fiscal, and industrial effects of tariff laws; (2) the relation between rates on raw materials and finished products; (3) the effects of ad valorem and specific duties; (4) the effects of the tariff on labor; (5) tariff relations with other countries; (6) the best arrangement of schedules and classifications; and (7) unfair methods of competition and unfair acts in the importation of articles, or in their sale after importation. Besides undertaking inquiries in these general fields upon its own initiative, the Commission must make special investigations and reports at the request of the president and of either branch of Congress, and even upon the request of interested private parties. The information thus acquired must be placed at the disposal of the president and Congress whenever asked.

The Tariff Commission has no power to make changes in tariff laws or in their administration; and until 1922 it could make no recommendations to the president or to Congress except of a general character. The tariff acts of 1922 and 1930, however, greatly extended the Commission's power by imposing the duty of investigating differences in the cost of production of any domestic article and of any like or similar foreign article, and of recommending to the president *specific* increases or decreases in the tariff rate. If the president approves the changes recommended, he issues a

<sup>1</sup> *U. S. Compiled Statutes* (1918), pp. 846-847; (1923), pp. 281-282, 333-335; *Code of the Laws of the U. S.* (1926), pp. 529-531. The members of the Commission receive salaries of \$11,000.

<sup>2</sup> Act of 1930, §§ 330-341.

proclamation putting the new rate into effect. His disapproval of the commission's recommendations amounts to a veto. These features of the acts of 1922 and 1930 are commonly called the "flexible provisions" of the tariff; and they mark an important departure from former methods of tariff revision.<sup>1</sup>

Notwithstanding its increased importance, the work of the Tariff Commission, prior to 1930, proved highly disappointing in many quarters, and confidence in its fairness was seriously shaken by the evidence of partisanship and prejudice that came to light in 1926 and 1927.<sup>2</sup> With the reorganization of the commission in 1930, it is to be hoped that public confidence will be restored; for the commission can be of very great value in adjusting future tariff rates on something that at least approaches a scientific basis.<sup>3</sup>

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XXV

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<sup>1</sup> F. W. Taussig, "The Tariff Act of 1922," *Quar. Jour. Econ.*, XXXVII, 1-28 (Nov., 1922); "The Tariff, 1929-1930," *ibid.*, XLIV, 175-204 (Feb., 1930); "The Tariff Act of 1930," *ibid.*, XLV, 1-21 (Nov., 1930); A. Borglund, "The Tariff Act of 1930," *Amer. Econ. Rev.*, XX, 467-479 (Sept. 1930).

<sup>2</sup> Early in 1926, the Tariff Commission was subjected to an investigation by a Senate committee. See S. Bent, "The Man Who Threw the Tariff Bomb," *Nation*, CXXII, 83-84 (Jan. 27, 1926); *Searchlight on Congress*, XI, 6-7 (Feb., 1926); F. W. Taussig, "The United States Tariff Commission and the Tariff," *Amer. Econ. Rev.*, Supp., XVI, 171-202 (Mar., 1926); *Literary Digest*, LXXXVIII, Mar. 27, 1926, pp. 8-10, "The Tariff Commission under Fire"; C. Hackett, "The Failure of the Flexible Tariff, 1922-1927," *New Republic*, LI, 244-247 (July 17, 1927); E. P. Costigan's letter resigning from the commission, *N. Y. Times*, Mar. 15, 1928; *U. S. Daily*, Mar. 16, 1928. Early in 1926, the National Board of Farm Organizations adopted resolutions calling upon Congress to abolish the commission. *N. Y. Times*, Feb. 4, 1926.

<sup>3</sup> During the period from March, 1922, to June 30, 1930, the Commission undertook fifty investigations, and recommended increases in thirty-two instances and decreases in only six cases. New vigor in pressing investigations has marked the activity of the reorganized commission. Between the approval of the tariff law in June, 1930, and the following December 1, fifty-two requests for investigations of production costs were filed with the commission. Ten of these, involving thirty-five investigations, came from the Senate, and the remainder from private sources. All of them reflect the widely-felt dissatisfaction with the rates imposed by the Hawley-Smoot act. *U. S. Daily*, September 5, 1930, pp. 2075 ff. Cf. *Amer. Econ. Rev.*, Supp., XIX, 140-154 (Mar., 1929), "Tariff-Making in the United States;" *Congressional Digest*, VIII, 161-182 (June-July, 1929), series of articles on "Making a Tariff Law." On the earlier activities of the commission, see E. P. Costigan, "The United States Tariff Commission," *Searchlight on Congress*, IV, 16-20 (Sept., 1919); *Fourteenth Annual Report of the U. S. Tariff Commission* (1930), 4-5.



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## CHAPTER XXVI

### NATIONAL EXPENDITURES, DEBTS, BANKING, AND CURRENCY

Having seen the manner in which the national government obtains its revenues, and the main sources of its income, we must now review the objects for which, and the methods by which, these immense sums are appropriated and expended. For the fiscal year ending June 30, 1930, expenditures, all told, amounted to \$8,614,229,750. Of this sum, however, considerably less than one-half (\$3,994,152,487) was chargeable against the "ordinary receipts" mentioned in the preceding chapter. Omitting disbursements included in the public debt account, the following table will give a fair idea of the way in which the national revenues were allocated in 1930 to the different branches or activities of the government.<sup>1</sup>

Legislative department .....		\$ 20,137,556	Expendi- tures
Including: Library of Congress .....	\$ 2,317,844		
Government Printing Office .....	2,908,352		
Executive Office .....		692,194	
Veterans' Bureau .....		443,306,134	
Other independent offices .....		48,196,935	
Including: Tariff Commission .....	710,695		
Shipping Board .....	31,625,033		
Civil Service Commission .....	1,415,846		
Vocational Educational Board .....	8,455,770		
Federal Reserve Board .....	2,832,923		
Federal Trade Commission .....	1,447,667		
Federal Farm Board .....	731,735		
Interstate Commerce Commission .....	8,098,758		
District of Columbia .....		45,181,204	
Department of Agriculture .....		177,329,578	
Including: Forest Service .....	16,157,400		
Bureau of Animal Industry .....	9,576,857		
Bureau of Agriculture Economics .....	5,968,516		
Weather Bureau .....	3,390,235		
Bureau of Public Roads .....	3,509,324		
Road construction .....	85,856,790		
Coöperative Agricultural Extension			
Work .....	7,539,786		
Office of Experiment Stations .....	4,725,092		

<sup>1</sup> Compiled from the *Annual Report of the Secretary of the Treasury* (1930). See C. P. White, "The Trend in Federal Expenditure," *Annals Amer. Acad., Politt. and Soc. Sci.*, CXIII, 1-7 (May, 1924); J. L. Keedy, "Are We Spending Too Much for Government? The Trend of Federal Expenditure," *Nat. Mun. Rev.*, XVI, 246-250 (Apr., 1927).

Plant Quarantine and Control Administration .....	\$8,804,966	
Meat Inspection .....	5,552,496	
Loans to farmers in stricken areas ..	4,693,972	
Department of Commerce .....		\$57,056,924
Including: Patent Office .....	3,679,014	
Bureau of Lighthouses .....	11,525,957	
Bureau of the Census .....	14,643,226	
Bureau of Foreign and Domestic Commerce .....	4,751,108	
Aircraft in commerce .....	6,709,802	
Bureau of Mines .....	2,613,928	
Department of the Interior .....		288,877,665
Including: Army and Navy pensions .....	218,956,342	
Indian Affairs .....	31,722,665	
General Land Office .....	4,729,689	
Bureau of Education .....	3,705,531	
Bureau of Reclamation .....	10,995,304	
Department of Justice .....		32,170,775
Department of Labor .....		10,613,292
Including: Bureau of Immigration .....	8,481,444	
Bureau of Naturalization .....	1,030,321	
Children's Bureau .....	332,776	
Navy Department .....		375,446,118
Post-Office Department Deficit .....		91,714,451
Department of State .....		14,156,557
Including: Salaries and expenses .....	1,593,896	
Foreign intercourse .....	12,575,979	
Treasury Department .....		194,539,669
Including: Collection of customs .....	22,597,847	
Collection of internal revenue .....	34,543,745	
Prohibition and narcotic laws enforcement .....	15,401,210	
Coast Guard .....	29,285,768	
Federal Farm Loan Bureau .....	949,462	
Bureau of Engraving and Printing ..	6,218,448	
Public Health Service .....	10,373,388	
War Department .....		453,973,041
Including: Panama Canal .....	11,264,438	
Rivers and harbors .....	106,357,125	
Interest on public debt .....		658,602,154
Agricultural Marketing Fund .....		148,591,009

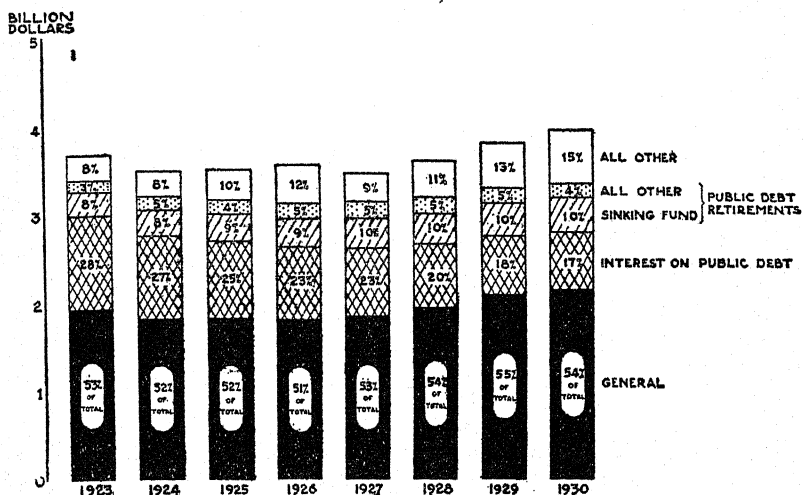
Not a dollar of the nation's huge annual income can be legally expended except by direct authority of Congress; and the passing of the great appropriation bills forms one of the most important tasks of that body in every session—almost, as a rule, the sole task in the short session. Some of these measures contain thousands of items, and fill upwards of a hundred printed pages in the *Statutes at Large*. For appropriations are made in great detail. In England, Parliament is content to vote lump sums and leave the administrative authorities to distribute the funds, including the fixing of salaries and wage-scales, largely at their discretion. In our own country, however, one of the chief means by which Congress exercises its exceptionally close control over administration is the de-

tailed and specific allocation of money, cutting off an activity here by leaving it without financial support, adding an activity or agency there by making the necessary fiscal provision, and in these and other ways predetermining far more than do most foreign parliaments the lines on which the government's work shall be carried on.<sup>1</sup>

CHAP.  
XXVI

For a long time, appropriation bills were framed and reported, on the basis of estimates submitted by the secretary of the treasury,

# EXPENDITURES, 1923-1930



Principal classes of expenditures chargeable against ordinary receipts for the fiscal years 1923 to 1930.

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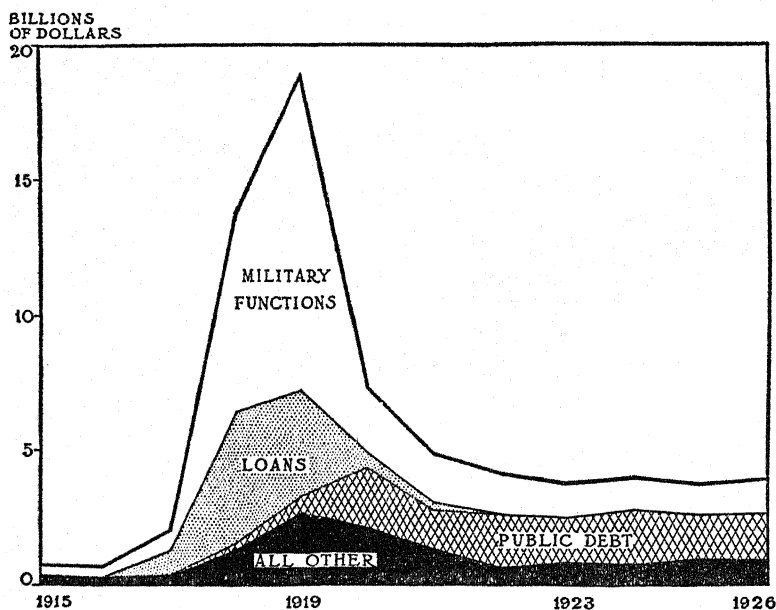
by the same committee in the House of Representatives that prepared revenue measures, i.e., the ways and means committee, which was raised from a select to a standing committee in 1802; and until 1823, a single annual appropriation bill met all needs. Gradually, however, appropriations came to be separately provided for in a number of distinct bills, and in 1865 a separate committee on appropriations was created. At first, the new committee handled all appropriation bills, as had the ways and means committee before it. But soon it was urged that the various committees having jurisdiction of government activities for which appropriations were made should control the appropriation bills relating to the respec-

The framing of appropriation bills

<sup>1</sup> In France, however, detailed appropriations are made, very much as in the United States.

tive activities; and after 1880 no fewer than eight committees, in addition to the committee on appropriations, received this right. Thus, the post-office bill (the greatest of the appropriation bills) came to be prepared by the committee on post-offices and post-roads; the army bill and the navy bill were in charge, respectively, of the committees on military affairs and naval affairs; the agricultural bill was the work of the committee on agriculture. The

## MAIN CLASSES OF EXPENDITURES



Main classes of expenditures for the fiscal years 1915 to 1926

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committee on appropriations retained jurisdiction, normally, over only the appropriations for executive, legislative, and judicial expenses, for sundry civil expenses, for fortifications and coast defenses, for the District of Columbia, for pensions, and for all deficiencies.<sup>1</sup>

Unsatisfactory character of the former system

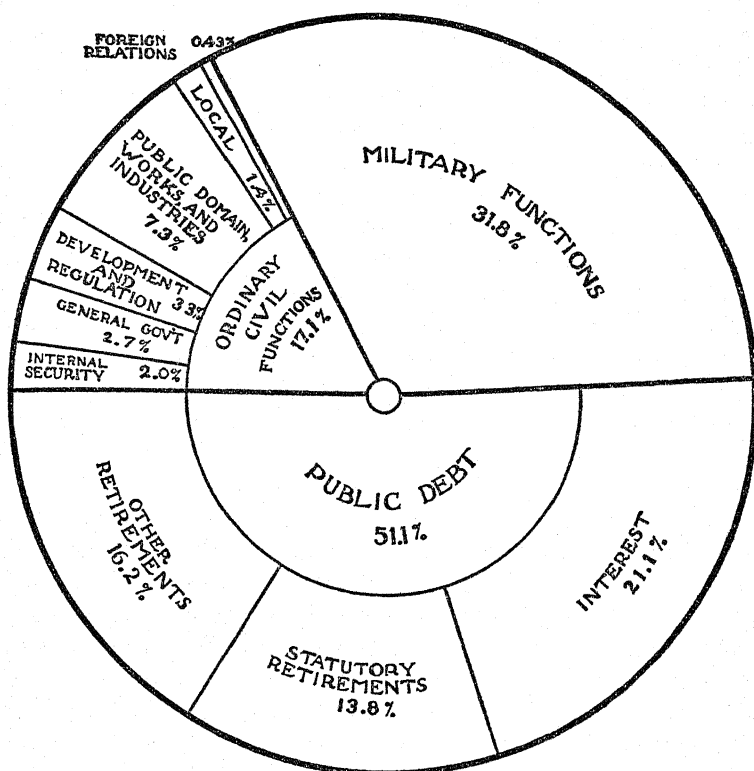
This division of labor was defended on the plausible ground that these specialized committees could obtain a better knowledge of what was needed in their respective fields than the general

<sup>1</sup> Prior to the enactment of the budget law of 1921, fourteen separate appropriation bills were reported by these nine committees.

appropriations committee. But, unfortunately, the distribution of labor meant a division of responsibility which in a very short time justified the worst apprehensions of persons who had opposed the new arrangements. Under acts of 1789 and 1800, the secretary of the treasury presented annual estimates of expenditures. But these

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## FUNCTIONAL DISTRIBUTION OF EXPENDITURES



Functional distribution of expenditures, by percentages, for the fiscal year 1927

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estimates were merely gathered up from the several departments and detached agencies and transmitted without revision. The head of each department prepared the estimates for his department without any reference whatever to those submitted by the heads of other departments, and equally without reference to the estimated revenues for the fiscal year. Similarly, after the splitting up of committee jurisdiction took place, each of the nine House

committees which had power to report appropriation measures—not to mention five others which could report bills incidentally involving charges on the treasury<sup>1</sup>—"acting independently, without restraint, and without regard either to its fair proportion or to the amount of available revenue, reported whatever it deemed desirable, apparently indifferent to an abnormal increase in appropriations or to the creation of a treasury deficit."<sup>2</sup> Quite unlike the English Parliament, which receives all proposals for appropriations from a single source, *i.e.*, the Treasury, and will not consider any such proposal which does not come with the cabinet's approval, Congress received, and usually adopted with little modification (except increases), proposals emanating originally from more than two score separate, and often rival, departments, commissions, and other agencies, and reported by more than a dozen different committees. Under these circumstances, "log-rolling" became a fine art, the "pork-barrel" an inexhaustible resource.

Movement  
for a  
budget  
system

The upshot was a startling growth of public expenditures, whose effect was aggravated by frequent evidences of sheer extravagance and waste; and presently demand arose for reform.<sup>3</sup> Many influences worked for change. The example of the English, French, Canadian, and other budget systems made strong appeal. Rapid progress of budgetary reform in the states had its effect.<sup>4</sup> Careful studies by such agencies as President Taft's Economy and Efficiency Commission and the privately endowed Institute for Government Research at Washington, leading to scientifically framed reports and the publication of scholarly books and a wealth of popular literature, gave the movement impetus. But the final push was supplied by the World War, whose costs, even to the United States, were such as to demand the adoption of every known expedient by which to lessen expenditures and make tax reductions

<sup>1</sup> In the Senate, appropriations, until recently, were handled by some fifteen committees.

<sup>2</sup> D. S. Alexander, *History and Procedure of the House of Representatives*, 250.

<sup>3</sup> On mounting expenditures and the need for a budget system, see H. J. Ford, *The Cost of Our National Government* (New York, 1910); *Report of the Commission on Economy and Efficiency*, 62nd Cong., 2nd Sess., H. Doc. No. 851 (1912); T. E. Burton, "The Scandal of the Federal Appropriation Bills," *World's Work*, XXV, 438-443 (Feb., 1923); B. J. Hendrick, "Shall We Have Responsible Government?," *ibid.*, XXXI, 189-202, 273-285 (Dec., 1915-Jan., 1916); H. L. Stimson, "A National Budget System," *ibid.*, XXXVIII, 371-375, 528-536 (Aug.-Sept., 1919); C. C. Maxey, "A Little History of Pork," *Nat. Mun. Rev.*, VIII, 691-701 (Dec., 1919); W. F. Wiloughby, *The Problem of a National Budget* (New York, 1918); series of articles in *Acad. Polit. Sci. Proceedings*, IX, No. 3 (July, 1921).

<sup>4</sup> See Chap. xxxvi below.

possible. A national budget system had been talked about for twenty years; the war made it a practical necessity; and in 1921 it became a reality.<sup>1</sup>

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The first budget bill passed by Congress, in the session of 1919-20, was vetoed by President Wilson, on the ground that one of its clauses unconstitutionally limited the president's power of appointment by withholding the power of removal.<sup>2</sup> But another measure became law soon after the opening of President Harding's administration. This Budget and Accounting Act of 1921<sup>3</sup> created two important bureaus—the general accounting office and the bureau of the budget. The primary purpose of both is the same, namely, to save money for the tax-payers by economy in planning future expenditures, by economy in spending funds already appropriated, and by increasing efficiency in administrative organization and procedure.

Budget and  
Accounting  
Act, 1921

The general accounting office is made independent of the executive departments and is under the direction and control of the comptroller-general of the United States, appointed by the president and Senate for a term of fifteen years. Further to emphasize the comptroller-general's independence, he is made removable only by impeachment or, for cause, by joint resolution of Congress, after notice and hearing. To this office has been assigned auditing and bookkeeping duties formerly performed by various officials connected with the Treasury Department; and the new law provides for an audit of government accounts quite independent of the spending departments or agencies whose transactions are under scrutiny. Under ordinary circumstances, the work of the office is purely routine and devoid of the spectacular; and thus far it has attracted little public attention or interest. It is, none the less, service of the first importance, and can be made to contribute much to the economy and efficiency of our national administration.<sup>4</sup>

General  
accounting  
office

This is due, in part, to the fact that the Budget and Accounting Act empowered the comptroller-general to conduct investigations of all matters relating to the receipt, disbursement, and application

<sup>1</sup> A brief history of the movement for a budget system is given in *Amer. Year Book* (1925), 317-321.

<sup>2</sup> T. R. Powell, "The President's Veto of the Budget Bill," *Nat. Mun. Rev.*, IX, 538-545 (Sept., 1920).

<sup>3</sup> *U. S. Compiled Statutes* (1923), pp. 8-12; *Code of the Laws of the U. S.* (1926), pp. 975-981.

<sup>4</sup> See O. R. McGuire, "Legislative or Executive Control over Federal Funds," *Illinois Law Rev.*, XX, 455-474 (Jan., 1926); W. F. Willoughby, *The Legal Status and Functions of the General Accounting Office of the National Government* (Baltimore, 1927).



of public funds, and report his recommendations to the president and Congress. Furthermore, he has been granted the highly important power to inaugurate a reform in the methods of accounting used by the various departments, which, when fully exercised, may give our government a method of bookkeeping unexcelled in any other country. But, although steady progress has been made in improving the accounting system since 1921, the characterization of this system by the first budget director, General Charles G. Dawes, as one that "would not be tolerated for a day in a properly conducted private business enterprise" still largely holds true.<sup>1</sup> Of even greater potential importance, perhaps, is the grant of authority to the comptroller-general to settle all claims against or due the national government; and no such settlement is final without his approval. This power seems to afford an opportunity for the general accounting office to develop into an effective agency of budget control—that is, an agency having legal authority, which the budget bureau lacks, to see that the provisions of the budget, as enacted into law, are properly executed.

Far more public attention has been bestowed upon the organization and work of the budget bureau. At the bureau's head is the director of the budget, who enjoys even greater immunity from congressional influence than the comptroller-general, since he is appointed by the president alone, and for an indefinite term. He likewise has complete freedom from control by any of the executive departments; for, although the bureau is nominally attached to the Treasury Department, it is, in all essential points, an independent agency, responsible only to the chief executive. As the personal agent of the president, the director of the budget is clothed with extraordinary powers; in matters of finance, for example, he may overrule members of the cabinet; and if he is sustained by the president, his decision prevails. Subject likewise to presidential approval, the director's word is law for every bureau, board, commission, or department of the government as to what expenditures shall be recommended to Congress and what ones shall not.<sup>2</sup> This

<sup>1</sup> Writing in December, 1927, General Dawes spoke of the government's system of bookkeeping as "archaic and ridiculous," and declared that the bookkeeping methods of the different departments were still decentralized and "furnish little aid to the executive or to his agent, the director of the budget, in determining the relative operating efficiency and cost of the departments. They operate also to keep Congress uninformed." *Amer. Bar. Assoc. Jour.*, XIII, 697-698 (Dec., 1927); *U. S. Daily*, Dec. 27, 1927, p. 3056.

<sup>2</sup> "The isolation between departments is broken. Cabinet officers are at the beck and call of a subordinate of one of them, whose orders take precedence

phase of the budget act has made the president, through the director of the budget, virtually the general business manager of the government. The budget bureau prepares for him the budget and any supplementary or deficiency estimates that may be necessary; and, to this end, the bureau has been given authority "to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments."<sup>1</sup> With this information before him, the president is in a position to submit annually to Congress (1) detailed estimates of the appropriations necessary for the support of the various branches of the government; (2) a statement of the probable revenues; (3) recommendations for the disposition of an estimated surplus or for meeting an anticipated deficit; and (4) all essential facts pertaining to the bonded and other indebtedness of the government.<sup>2</sup> Thus, under the new budget system, all estimates come to Congress as parts of a carefully coordinated fiscal plan, for which the president assumes full responsibility—a striking contrast to the *mélange* of independent appropriation proposals formerly unloaded upon that body by its various committees. Indeed, as now submitted, "the budget presents one of the clearest general financial reports of the operations of a government that is available for any government, either in the United States or in foreign countries."<sup>3</sup>

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To ensure that the president's recommendations will be the real basis of congressional appropriations, it became necessary to reorganize the committee system somewhat. Consequently, in 1920, even before the budget law was passed, the House appropriations committee was enlarged to thirty-five members,<sup>4</sup> and was granted

Committee  
changes  
entailed

over their own, in their own departments. . . . If an admiral stands on his dignity and refuses to obey orders except from his superior officers, the budget director fills out a blank order already signed by the president and hands it to him. If the budget director thinks that the treasurer of the United States ought to change his century-old way of keeping books, he tells him so in a public speech, in the presence of all the departments. These are not fanciful hypotheses. Each of these incidents actually happened." C. H. Rowell, "The Next Step in Washington," *World's Work*, XLIX, 162 (Dec., 1924).

<sup>1</sup> Brief descriptions of the various steps in the preparation of the budget will be found in *Amer. Year Book* (1926), 310-315. Cf. H. P. Seidemann, "The Preparation of the National Budget," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 40-50 (May, 1924).

<sup>2</sup> Not the least important of the functions of the budget bureau is studying the organization and operation of all administrative agencies and reporting to the president its recommendations as to the regrouping of agencies, their internal reorganization, and such other changes as may add to their efficiency. Cf. pp. 571-572 below.

<sup>3</sup> H. P. Seidemann, *op. cit.* For the president's budget message, December, 1930, see *U. S. Daily*, Dec. 4, 1930, p. 3029; *New York Times*, Dec. 4, 1930.

<sup>4</sup> In 1930, the House committee consisted of twenty-one majority and four-

jurisdiction over all appropriation measures, with the further provision that the preparation of specific measures might be assigned to fifteen sub-committees.<sup>1</sup> That part of the annual budget which relates to appropriations is now, therefore, referred *in toto* to the appropriations committee; all appropriation bills arising out of it, while prepared by sub-committees, are reported by the general committee; and no other committee may introduce any measures of the kind. Corresponding changes in Senate committees took place in 1924.<sup>2</sup>

The new system has been in operation for too brief a period to permit a full appraisal of its workings. Much remains to be done before the best results can be looked for. (1) It is highly desirable, if not essential, that members of the cabinet and the director of the budget be given seats in Congress, where they may appear to explain and justify to the entire membership of each house the various items contained in the budget. (2) It is essential that Congress adopt a self-denying ordinance or rule—similar to that under which the British House of Commons has been working for two hundred years—whereby the houses shall agree not to increase any appropriation asked for, or consider any new appropriations not requested by the president, but shall, instead, confine themselves to criticizing, reducing, or striking out items prepared and submitted by the executive. The need for this was demonstrated in 1923 when the House, in opposition to the recommendation of both the budget bureau and its own committee on appropriations, added twenty-nine million dollars to the army bill for river and harbor work, and the Senate accepted the amendment. (3) If Congress is unwilling to take such a step, a constitutional amendment should be adopted permitting the president to veto separate items in appropriation bills, as a means of overcoming the well-known tendency of the houses to pass extravagant minority members; the Senate committee, of eleven majority and nine minority members.

<sup>1</sup> " . . . The appropriation bills have been reorganized and reformed. The old bills . . . have either been abolished or revamped. They were illogical, unscientific and confusing. The appropriations for a single department were often found in many different bills. The War Department formed the worst illustration of this diffusion . . . its funds being found in no less than five different measures. The new bills . . . are arranged according to departments and other units of organization. All of the appropriations for a given department are to be found in one bill or segregated as a part of a bill. . . ." M. B. Madden, chairman of the House committee on appropriations, in *Congressional Record*, June 30, 1922.

<sup>2</sup> For a summary of these committee changes, see *Amer. Polit. Sci. Rev.*, XVIII, 84-88 (Feb., 1924).

gant appropriations.<sup>1</sup> Granting the item veto to the president would be no revolutionary step; it is already possessed by the governors of all but nine states.<sup>2</sup>

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Despite these shortcomings, large economies have been effected since the inauguration of the budget system in 1921. It should be remembered, however, that such a result is by no means insured by the mere enactment of a budget law and setting up of a budget bureau. The needed inspiration and pressure to make the system effective in checking waste and promoting efficiency must come from above—from a president and a budget director who are themselves whole-heartedly devoted to the cause of governmental economy. Fortunately, executives of that type have been in office during the formative period of the new budget system. Under the energetic administration of the first director of the budget and his able successor,<sup>3</sup> not only have departmental estimates been scrutinized and revised downward perhaps as never before, but it has been made the business of the budget bureau to study in minute detail the ways in which the government's money is spent and to introduce more economical methods of handling governmental business.

Economies  
under the  
budget  
system

With these ends in view, the bureau of the budget has created numerous auxiliary bodies, called coördinating agencies, such as the federal purchasing board and the general supply committee, to bring about coöperation, or a greater measure of centralization, in the purchasing of governmental supplies and equipment; the federal liquidation board, to assist in the reduction of war-time stocks of surplus property; a federal specifications board and an inter-departmental board of contracts and adjustments, to revise and standardize specifications for government supplies and contracts for government construction work. In addition, the budget

Coördi-  
nating  
agencies

<sup>1</sup> *Amer. Pol. Sci. Rev.*, XVIII, 88 (Feb., 1924). In fairness to Congress, however, it should be said that, with the exception of the second session of the Seventieth Congress (1928-29), every Congress has appropriated less money than the budget estimates called for. In the exception noted, the appropriations exceeded the budget by over \$9,700,000. "The first seven budgets [for the fiscal years 1923 to 1929] carried estimates totaling \$27,000,475,970, which supplemental estimates increased to \$29,800,233,790. On these estimates, Congress appropriated \$29,478,282,294, a reduction below budget requests of \$321,951,495. . . . The total reduction in the six budgets following 1923 is \$55,971,630, a per cent of difference of only one-fifth of one per cent. . . ." Budget message of President Coolidge, *U. S. Daily*, Dec. 6, 1928, p. 2465. Cf. *Amer. Year Book* (1926), 314; (1929), 158.

<sup>2</sup> See p. 307 above.

<sup>3</sup> The first director of the budget was Charles G. Dawes, whose book, *The First Year of the Budget in the United States* (New York, 1923), is a most interesting account of the problems met and solved from day to day in inaugurating the new system. From 1923 to 1929, the director of the budget was Gen. H. M. Lord. The present director is Col. J. C. Roop.

bureau has organized a federal communications service, a permanent conference on printing, an interdepartmental board on simplified office procedure, a federal real estate board, a board of hospitalization, a traffic board, and a board for the coördination of motor transportation in the District of Columbia.

While some of these coördinating agencies function wholly, or mainly, in Washington, the possibilities for increased economy and efficiency in the field services scattered over the country have not been overlooked. The country has been divided into nine large geographical areas, and a sort of "professional dollar-saver," called a coördinator, has been placed in charge of each. These area coördinators supervise and coördinate the activities of the various governmental agencies in their respective areas relating to the purchase, storage, transfer, use, and disposal of supplies, and see to the transfer of surplus equipment from one agency to another and the loan of equipment by one agency to another.<sup>1</sup>

Each area is subdivided into a number of active or potential coördinating zones. In each of the active zones, now (1931) numbering 293, there is a federal business association serving as the coördinating unit for the zone. These associations are composed entirely of federal employees, who hold regular meetings. Their sole purpose is to promote economy and efficiency in the conduct of public business in their respective localities. The work of converting the potential zones—where business organizations have not yet been formed—into active zones is progressing rapidly.<sup>2</sup>

Periodically, in January and June of each year during President Coolidge's administration, was held, after the manner of any well-managed business concern, a meeting of all the executive heads of the various departments and bureaus of the government, called the Business Organization of the Government. This meeting was addressed by the president and the director of the bureau of the budget, who discussed at length the business operations of the government on the side of conservation and expenditure of revenue, the progress made in introducing economy and efficiency since the preceding meeting, and plans for the future. It was intended to be both an informational and an inspirational occasion, and as

<sup>1</sup> Cf. Office of the Chief Coördinator, "Organization and Functions of the Coördinating Service," Bulletin No. 101 (Jan. 2, 1929), and Supplement No. 1 (Feb. 20, 1930).

<sup>2</sup> The story of the savings effected by the various coördinating bodies, as set forth in the annual reports of the director of the budget, makes highly interesting reading. These reports may be obtained from the Superintendent of Documents, Washington, D. C.

such it deservedly attracted wide attention and was reported at length in the leading newspapers.<sup>1</sup>

Through this widely ramifying organization, the new budget system has developed into a most effective instrumentality whereby the president may hold in leash the several spending agencies of the government.<sup>2</sup> At the same time, it enables a president and Congress that are so minded to strangle or starve deserving administrative services in the interest of tax reduction. And during the brief period since 1921, Congress has more than once shown a disposition to vote more generous appropriations to meet the demands of local constituencies for public buildings, local improvements, bonuses, and grants-in-aid than for the upbuilding or enlargement of certain highly useful, but non-political, administrative agencies.<sup>3</sup>

In ordinary times, and for ordinary undertakings, the income derived from taxation and from fees, services, and other miscellaneous sources suffices to meet the government's needs; at all events, deficits of one year are apt to be offset by surpluses of another. In time of war, however, or other unusual strain, such as a period of business depression, or to meet the cost of some great public work, like the Panama Canal, the government is obliged to resort to borrowing; and the accumulated obligations thus incurred give rise to the national debt. The power to borrow money is expressly granted to Congress in the constitution, being indeed one of the very few powers conferred absolutely without restriction.<sup>4</sup> The United States operates under no debt limit, such as is fixed for many of the states in their constitutions, and such as states commonly establish for counties, cities, and towns. Congress may borrow for any purposes whatsoever, in any amount, and on any terms; and it may provide or fail to provide for the repayment of the loan, with or without interest. The method of borrowing is usually a sale of interest-bearing bonds or treasury certificates to banks, corporations, and private citizens. Never since Revolutionary times has the government been under the absolute necessity of looking abroad for money; although on a few occasions, notably during the Civil War, it has done so, and, of course, its securities

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The  
budget as  
an instru-  
ment of  
control

Borrowing  
money

<sup>1</sup> Under the administration of President Hoover and a new director of the budget, these meetings have been discontinued. The addresses of the president and director of the budget at the last meeting, in January, 1929, are reported in full in the *U. S. Daily*, Jan. 29 and 31, 1929.

<sup>2</sup> C. O. Sherrill, "Czaristic Tendencies of the National Budget System," *Nat. Mun. Rev.*, XV, 141-142 (Mar., 1926).

<sup>3</sup> F. A. Cleveland, "National Budget," in *Amer. Year Book* (1926), 314.

<sup>4</sup> Art. I, § 8, cl. 2.

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were to be found, prior to the World War, in the hands of foreign, as well as domestic, investors. On the eve of our entrance into this war, in 1917, the national debt amounted to about a billion dollars; in 1917-18 alone, some twenty billions were borrowed, chiefly by means of the familiar "liberty bond" issues; and in 1919 the total indebtedness exceeded twenty-five and a quarter billions. By June 30, 1930, however, the sum had been reduced to less than sixteen and a quarter billions.<sup>1</sup>

National  
banks: the  
banks of  
1791-1811  
and  
1816-36

Mainly to facilitate the sale of government bonds on favorable terms during the Civil War, our present system of national banks was created by act of Congress in 1863. Before that, the government had established two great banking institutions, each operating under a charter granted by an act of Congress, in 1791 and 1816 respectively, for a period of twenty years. Each of these banks assisted the government in collecting national revenues, served as a depository of public funds, lent money to the government from time to time, and was empowered to issue bank notes which served as paper money. The history of the first of these banks was comparatively uneventful. The career of the second one was, however, marked by grave mismanagement in earlier years, and only after reorganization and under new management did the institution enter upon a period of confidence and success.<sup>2</sup> Even at that, long before its charter expired, it incurred the hostility of rival state banks, which successfully played upon the widespread prejudice then existing against corporations of all kinds; and the question of renewing the bank's charter became the leading issue in the presidential campaign of 1832. Henry Clay, who championed the bank, was overwhelmingly defeated by President Jackson, the avowed enemy of the institution, who had previously vetoed a bill renewing the charter. Thereupon the bank proceeded to wind up its affairs, and in 1836 it ceased to do business as a national institution.

National  
banking  
laws of  
1863-64

The Supreme Court's decision in the celebrated case of *McCulloch v. Maryland* in 1819<sup>3</sup> established permanently, and put practically beyond question, the power of Congress to create banking corporations. From the time, however, when the second Bank of

<sup>1</sup> See W. M. Kiplinger, "Managing the Public Debt," *N. Y. Times*, Jan. 3, 1926; O. L. Mills, "Reducing the Nation's Debt," *ibid.*, Nov. 2, 1930.

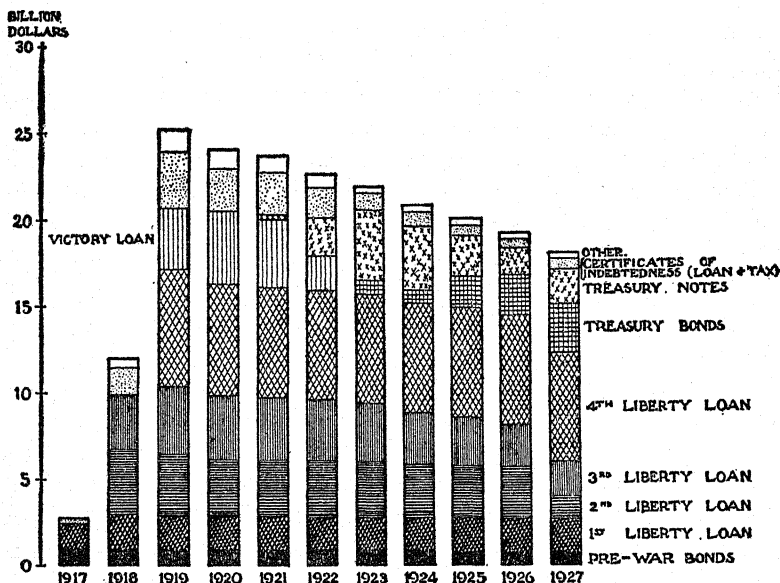
<sup>2</sup> Its history is fully set forth in R. C. H. Catterall, *The Second Bank of the United States* (Chicago, 1903). See also R. C. McGrane [ed.], *The Correspondence of Nicholas Biddle* (Boston, 1919).

<sup>3</sup> See pp. 108-110 above.

the United States closed its doors in 1836 until the Civil War, Congress did not avail itself of its right to establish a national banking system. Such banking institutions as existed in this period of nearly thirty years were created under widely varying state laws; and such paper currency as there was in the country consisted wholly of notes issued by these state and local banks. Naturally, the amount of such money fluctuated greatly from time to

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## FORMS OF INTEREST-BEARING DEBT



Interest-bearing debt outstanding at the end of each fiscal year from 1917 to 1927, by type of issue

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time; and its value, depending not only on the quantity issued but also on the resources and reputation of the institutions behind the notes, varied widely, both from state to state and in different parts of the same state. One of the principal reasons, therefore, for the creation of a national banking system in 1863, in addition to the desire to provide a market for government bonds, was to supplant these heterogeneous bank notes with a currency resting upon national authority, backed by the resources of the nation, and enjoying a uniform value throughout the country. With this end in view, Congress passed the national banking acts of 1863 and 1864, which



constitute the legal foundation of the present system of national banks.<sup>1</sup> The new banks were empowered to issue notes designed to circulate as money; and, in order to drive out of circulation the rival notes of state banks, the latter were subjected to a ten per cent tax, which no bank could afford to pay. Indirectly, therefore, the new banks were given a monopoly of the right to issue notes, a privilege which they enjoyed uninterruptedly until the creation of the federal reserve system in 1913.<sup>2</sup>

A half-century of experience with this national banking system showed that although it had many and obvious merits, the provisions of the law were too rigid in several respects, and, in times of business depression, positively harmful. For example, the circulating notes which a bank could issue were limited in amount to the total of its capital stock, and were based upon United States bonds which the bank owned and kept on deposit with the comptroller of the currency in Washington. This worked in such a way that when business was brisk, demanding a large volume of notes for its transactions, bonds might be too high in price to be profitably purchased by the banks as a basis for additional note issues; indeed, high prices might have just the opposite effect and lead banks to sell their government bonds, and thus actually reduce their note circulation. Note issues were thus inelastic and not responsive to commercial needs. There was a corresponding inelasticity of credit, even for borrowers who could offer perfectly good security. This was traceable in part to the defect just mentioned, in part to the rigid requirements regarding reserve funds, and in part to restrictions which prevented national banks from lending money on real estate mortgages. All these, and some minor, defects were clearly revealed in the "panic" of 1907, and eventually resulted in the passing of the act of 1913 creating the federal reserve system.<sup>3</sup>

<sup>1</sup> *U. S. Compiled Statutes* (1918), 1562-1580; *Code of the Laws of the U. S.* (1926), pp. 259-273. The number of national banks in existence June 30, 1930, was 7,311.

<sup>2</sup> Since 1913, the federal reserve banks have also issued notes. Indeed, when the federal reserve system was created it was expected that the national bank notes would soon be retired and their places taken by federal reserve notes. Owing in part to the World War, however, large amounts of national bank notes are still in circulation. See *Annual Report of the Secretary of the Treasury* (1930), 154-162, 277-278.

<sup>3</sup> *U. S. Compiled Statutes* (1918), pp. 1581-1594; *ibid.* (1923), pp. 631-650; *Code of the Laws of the U. S.* (1926), pp. 273-289. See H. P. Willis, "The Federal Reserve Act," *Amer. Econ. Rev.*, IV, 1-24 (Mar., 1914), and "The New Banking System," *Polit. Sci. Quar.*, XXX, 591-617 (Dec., 1915); J. L. Laughlin, "The Banking and Currency Act of 1913," *Jour. Polit. Econ.*, XXII, 293-318, 405-435 (April and May, 1914); E. E. Agger, "The Federal Reserve

By this law, the country is divided into twelve great districts, in each of which there is a federal reserve bank, commonly located in the district's principal city.<sup>1</sup> Unlike the national and state banks, these federal reserve banks do no business directly with the general public, but only with the "member banks," comprising all the national banks of the district and such state banks as have voluntarily become members of the federal system.<sup>2</sup> The reserve banks obtain their funds in part from the member banks, which are obliged to maintain certain reserves with the reserve bank of their district, and also by serving as the legal depositories of the funds belonging to the national government. Their capital stock (not less than \$4,000,000) is subscribed by the national and state banks in the district, or, in a few cases, by the national government and the general public. National banks are now allowed to issue, in addition to their notes based on government bonds, other notes based on such resources as currency, securities, and commercial paper deposited with the federal reserve bank of their district. The amount of such reserve fund, however, is not rigidly prescribed, as formerly, but may be adjusted to meet general or local business conditions, and also the character of the management as well as the resources of individual banks. These arrangements, together with more elastic provisions regulating the acceptance, discount, and re-discount of commercial paper, have done much to impart increased flexibility to credit. In 1927, Congress passed an act extending indeterminately the charters of federal reserve banks (which otherwise would have expired in 1934), authorizing national banks to establish branches in states where state banks are allowed to do so,<sup>3</sup> and in various other ways enlarging the powers of the national banks.<sup>4</sup>

CHAP.  
XXVIFederal  
reserve  
system,  
1913

System," *Polit. Sci. Quar.*, XXIX, 265-281 (June, 1914). On the congressional history of the Federal Reserve Act, see *Amer. Year Book* (1913), 38-53.

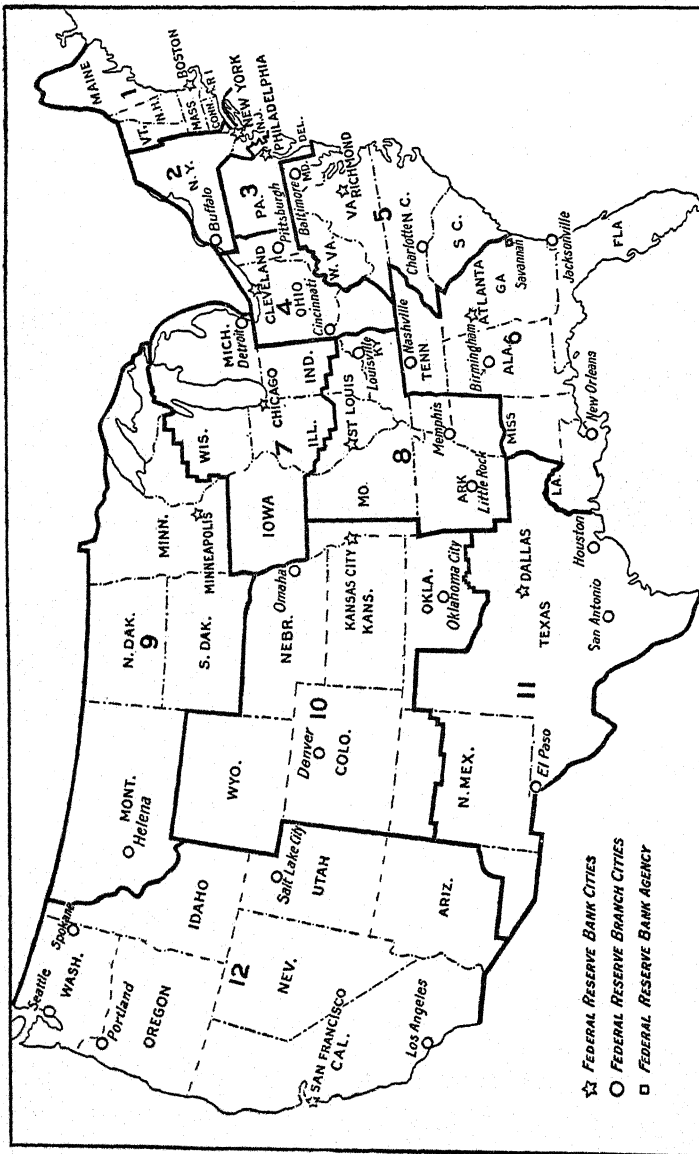
<sup>1</sup> The federal reserve cities are Boston, New York, Philadelphia, Cleveland, Richmond, Atlanta, Chicago, St. Louis, Minneapolis, Kansas City, Dallas, and San Francisco.

<sup>2</sup> C. F. Tippetts, "Decline of Membership in the Federal Reserve System," *Jour. Pol. Econ.*, XXXVI, 185-211 (Apr., 1928).

<sup>3</sup> These branches may not be established outside the bank's home city. No branches may be established in cities of less than 25,000 population; only one branch in cities of between 25,000 and 50,000 population; two in cities of from 50,000 to 100,000 population; and in cities of more than 100,000 the number of branches is to be determined by the comptroller of the currency.

<sup>4</sup> See *Annual Report of the Secretary of the Treasury* (1927), 86-87; *Congressional Digest*, V, 79-99 (Mar., 1926), "The New Federal Banking Law," H. H. Preston, "The McFadden Banking Act," *Amer. Econ. Rev.*, XVII, 201-218 (June, 1927); H. H. Preston, "Recent Developments in Branch Banking," *ibid.*, XIV, 443-462 (Sept., 1924).

THE FEDERAL RESERVE SYSTEM



Courtesy of the Federal Reserve Board.

Unification of the federal reserve and national banking systems throughout the country is secured through a central body, called the Federal Reserve Board, consisting of the secretary of the treasury and the comptroller of the currency *ex-officio*, and six other salaried members appointed by the president and Senate for ten-year terms.<sup>1</sup> The head of the board bears the title of governor. In the hands of this body have been placed the supervision and control of the entire federal reserve system of the country, and some measure of control over the national banks as well<sup>2</sup>—a sum total of power which enabled it to play an exceedingly important part in stabilizing financial conditions during the World War and the years of readjustment immediately following the armistice.<sup>3</sup> The federal reserve bank in each of the twelve districts is controlled by nine directors, three appointed by the Federal Reserve Board—one of whom is designated as the federal reserve agent and is chairman of the board—and six chosen by the “member banks,” each bank having one vote. Of the six directors so chosen, three may be bankers, but three must be actively engaged in business or agriculture. The governor of each federal reserve bank is chosen by the directors, and is the executive head.

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XXVIFederal  
Reserve  
Board

The national banks and the federal reserve system have been developed primarily to meet the needs of the commercial and industrial classes. It was not until 1916 that the national government undertook to provide special credit and banking facilities for the agricultural sections of the country. In that year and in 1923, two important acts<sup>4</sup> were passed for their benefit. The Farm Loan Act of 1916 divided the country into twelve districts, each containing a federal land bank, located in an important city.<sup>5</sup> Practically all

Federal  
land banks

<sup>1</sup> The law requires the president to make his selections with “due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country.” Salaries are fixed at \$12,000.

<sup>2</sup> The comptroller of the currency continues to have some supervisory power over the national banks. See J. G. Heinberg, “The Office of Comptroller of the Currency,” *Service Monographs*, No. 38 (Baltimore, 1926).

<sup>3</sup> See H. L. Reed, “The Recent Work of the Federal Reserve Administration,” *Amer. Econ. Rev.*, Supp., XVI, 303-315 (Mar., 1926); W. T. Foster and W. Catchings, “Is the Federal Reserve Board Keeping Faith?,” *Atlantic Mo.*, CXLIV, 93-102 (July, 1929); H. P. Willis, “The Failure of the Federal Reserve Board,” *No. Amer. Rev.*, CCXXVII, 547-556 (May, 1929).

<sup>4</sup> *U. S. Compiled Statutes* (1918), pp. 1599-1615; *ibid.* (1923), pp. 650-656; *Code of the Laws of the U. S.* (1926), pp. 296-326. On the constitutionality of these laws, see *Smith v. Kansas City Trust Co.*, 225 U. S. 180 (1921).

<sup>5</sup> These cities are Springfield, Mass., Baltimore, Md., Columbia, S. C., Louisville, Ky., New Orleans, La., St. Louis, Mo., St. Paul, Minn., Omaha, Neb., Wichita, Kan., Houston, Tex., Berkeley, Cal., and Spokane, Wash.

of the original capital of these banks was subscribed by the national government. The land banks lend money, not directly to individual farmers, but to organized groups called national farm loan associations, which in 1930 numbered 4,659; and it is part of the plan that these associations shall ultimately own the banks' capital stock. The combined capital stock of all federal land banks on June 30, 1930, amounted to \$65,939,367, of which \$64,818,652 was owned by national farm loan associations and only \$292,519 by the national government.<sup>1</sup> Bonds are issued by the banks, based on farm mortgages secured by the credit of the local loan associations or by United States bonds; and these securities are guaranteed by all the land banks. The act of 1916 also authorized the formation of joint-stock land banks, the shareholders of which are made individually responsible for the bank's obligations. The capital stock is subscribed wholly by private individuals. Otherwise these banks enjoy about the same privileges and perform about the same functions as the federal land banks.<sup>2</sup> With a view to exempting the bonds issued by these different banks from state and local taxation, they are designated by law as "instrumentalities of the government of the United States."

Intermedi-  
ate credit  
banks

All loans made by either the federal land banks or the joint-stock land banks are based upon real-estate mortgages. The agricultural credits act of 1923 went farther and sanctioned loans to individuals or to coöperative marketing associations based upon live-stock and farm produce on the way to market. Twelve federal intermediate banks were authorized, with a paid-up capital of \$2,000,000, subscribed, in part at least, by the national government.<sup>3</sup> The administration of these two acts, including the detailed supervision of the land and credit banks and the farm loan associations, is vested in a federal farm loan bureau. This, in turn, is presided over by the Federal Farm Loan Board, consisting of the secretary of the treasury, *ex-officio* chairman, and six other salaried

<sup>1</sup> *Annual Report of the Secretary of the Treasury* (1930), 191 ff.

<sup>2</sup> In 1930, there were 52 joint-stock land banks—at least one in every state except Delaware, Florida, New Mexico, Montana, and the New England states. One bank was in process of liquidation, and three were in receivership, leaving 48 in operation. See *Annual Report of the Secretary of the Treasury* (1930), 191-193; W. S. Holt, "The Federal Farm Loan Bureau," *Service Monographs*, No. 34 (Baltimore, 1924). An elementary explanation of the system is G. W. Norris, "The Farm Loan Bill in Words of One Syllable," *Outlook*, CXIV, 69-87 (Sept. 13, 1916).

<sup>3</sup> Each of these is located in a federal land-bank city. *Code of the Laws of the U. S.* (1926), pp. 315-319. The officers and directors of the federal land banks are *ex-officio* officers and directors of the intermediate credit banks. Cf. *U. S. Daily*, Apr. 19, 1930, pp. 541 ff.

members appointed by the president and Senate for a term of eight years.<sup>1</sup> The president designates one member of the board to be its executive head, with the title of farm loan commissioner. The act of 1923 also authorized the organization of national agricultural credit corporations, with a paid-up capital of not less than \$250,000, for the purpose of providing additional credit facilities for the agricultural and live-stock industries. These corporations are placed under the supervision of the comptroller of the currency.<sup>2</sup>

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XXVI

One other important phase of national finance calls for brief consideration, namely, the currency. Prior to the Revolution, the colonies were not forced by any controlling hand to adopt uniform monetary laws; and as a result, English, French, Spanish, and even German, coins of various and uncertain values passed from hand to hand. The same confusion characterized the metallic money of the Revolutionary period and constituted a serious obstacle to trade, while affording endless opportunities for fraud and extortion. Even the Articles of Confederation did little to improve a situation which was rapidly becoming intolerable when they went into effect. Congress, to be sure, was given power to regulate the alloy and value of coins struck either by its authority or by that of the states. But only a limited amount of money was coined by the national government, and the latter's control over state coinage amounted, in practice, to little. To the confusion arising from this situation was added the chaos produced by voluminous and rapidly depreciating issues of paper money. Prior to 1776, the restraining hand of the home government tended to keep such issues within bounds; but when this influence was removed, both the states and the Continental Congress began pouring forth issue after issue of paper largely or entirely unsupported by specie. By 1781, the country was financially demoralized; by 1787, business could hardly be carried on at all.<sup>3</sup> It is therefore not surprising that the framers of the constitution decided to put into that instrument provisions adequate to ensure a uniform national currency; and to this end Congress was expressly granted authority to "coin money [and] regulate the value thereof,"<sup>4</sup> while at the same time the states were

The  
currency

Chaotic  
condition  
before  
1789

<sup>1</sup> Salaries are fixed at \$10,000.

<sup>2</sup> *Code of the Laws of the U. S.* (1926), pp. 319-326; V. A. Valgren, "The Agricultural Credits Act of 1923," *Amer. Econ. Rev.*, XIII, 442-460 (Sept., 1923). See *Annual Report of the Secretary of the Treasury* (1930), 194-196.

<sup>3</sup> For a graphic account, see J. Fiske, *Critical Period of American History*, 163-186.

<sup>4</sup> Art. I, § 8, cl. 5.

forbidden to coin money, emit bills of credit, *i.e.*, paper money, and make anything but gold and silver coin legal tender in the payment of debts.<sup>1</sup>

In pursuance of the power given it, Congress enacted, in 1792, the first law providing for a truly national currency. Following the recommendations of Alexander Hamilton, secretary of the treasury, it adopted the now familiar decimal system of values instead of the cumbersome English system. At the same time, it authorized the use of both gold and silver coins, which became a fixed feature of our monetary system.

Paper  
money

Subsequently—notably in the decade after the Civil War and in the closing decade of the century—the power expressly granted to Congress to “coin money” and to “regulate the value thereof” gave rise to important currency questions in our national politics, especially in the form of “greenbackism” and a demand for the free and unlimited coinage of silver. The latter proposal raised no controversy as to constitutional authority; the question was simply one of wisdom and expediency. But the “greenback” issue involved grave questions of constitutional law. Until the Civil War, the only paper currency in the country, as has been pointed out,<sup>2</sup> consisted of state bank notes and the notes issued by the first and second banks of the United States during the periods 1791-1811 and 1816-1836. To meet the emergency created by that conflict, Congress passed several acts authorizing the issuance of paper money and making the new currency legal tender for the payment of private debts. Inasmuch as the constitution contains no clear grant of power for such legislation, and since it was known that the framers of that instrument definitely rejected a proposal to include such authorization among the powers expressly granted, it was not long before the right of Congress was challenged in the courts, and eventually in the Supreme Court, in an important series of actions usually called the Legal Tender Cases. In deciding the questions which these cases raised, the Supreme Court at first denied, but subsequently firmly upheld, the right of Congress to make paper money legal tender for private debts.<sup>3</sup>

Legal  
tender  
cases

Derivation  
of the legal  
tender  
power

This authority is a good illustration of “resulting,” as distinguished from implied, powers. The power is not expressly granted to Congress; nor can it be readily implied from any one of the

<sup>1</sup> Art. I, § 10, cl. 1.

<sup>2</sup> See p. 575 above.

<sup>3</sup> *Hepburn v. Griswold*, 8 Wall. 603 (1870); *Knox v. Lee*, *Parker v. Davis*, 12 Wall. 457 (1871); *Juilliard v. Greenman*, 110 U. S. 421 (1884).

express powers, unless it be the power to borrow money on the credit of the United States. Its existence is rather to be deduced from a combination of several powers expressly granted—indeed, from the general aggregate of powers conferred. It is deducible from the fact that Congress is the legislature of a sovereign nation, and that the power to make the notes of the government legal tender in payment of private debts is one of the powers belonging to sovereignty in other civilized nations, and is not expressly withheld by our constitution. It is deducible also from the fact that it is an appropriate means to the execution of the unquestioned powers of Congress to lay and collect taxes, to carry on war, to borrow money, and to regulate the currency. At all events, after the last of the legal tender cases was disposed of, in 1884, all doubt as to the power of Congress to issue paper money and impress upon it the legal tender character vanished.<sup>1</sup>

CHAP.  
XXVI

Several varieties of paper money, in addition to the greenbacks, are now in circulation, namely, silver certificates and treasury notes, based upon silver coin and bullion in the treasury; gold certificates, based upon gold coin and bullion in the treasury; federal reserve notes, which are gradually being substituted for the gold certificates; national bank notes; and the federal reserve bank notes. The balance of our national currency consists of gold coin in denominations of from two and one-half dollars (quarter eagles) to twenty dollars (double eagles),<sup>2</sup> silver coin (dollars, half-dollars, quarters, and dimes), and subsidiary coins, *i.e.*, nickels and cents. Paper money is manufactured in the bureau of engraving and printing at Washington; coins are made at three mints, located at Philadelphia, Denver, and San Francisco.<sup>3</sup>

Other  
forms of  
currency

<sup>1</sup> There is also judicial sanction for deriving the power from the right to coin money. On this point, see D. R. Dewey, *Financial History of the United States* (1903), 70. Cf. W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), I, 718-720.

<sup>2</sup> Gold-dollars were coined in 1848-89.

<sup>3</sup> J. P. Watson, "The Bureau of the Mint," *Service Monographs*, No. 37 (Baltimore, 1926); W. A. DuPuy, "How Our Money Is Manufactured," *Curr. Hist.*, XXIV, 236-241 (May, 1926); R. L. Strout, "The Big Job of Making the Small Dollar," *N. Y. Times*, Nov. 20, 1927; *Annual Report of the Secretary of the Treasury* (1930), 221-225, 277-279.



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## CHAPTER XXVII

### COMMERCE AND OTHER BUSINESS

Lack of power to control the conditions under which trade was carried on with foreign nations and among the several states was a main defect of the Articles of Confederation; and, as we have seen, it was a controversy between states on this subject that led to the Annapolis convention of 1786, and ultimately to the Philadelphia convention which framed the constitution in 1787.<sup>1</sup> The peaceful development of commerce, both domestic and foreign, on equitable and harmonious lines, was recognized as a prime requisite of national stability and growth. Accordingly, the new constitution was so drawn as to give Congress general power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."<sup>2</sup> Indeed, this important grant of authority stands second in the list of powers given to Congress, the first being that of raising money by taxes and loans.

Origin  
of the  
commerce  
clause

Only four limitations are imposed: (1) the foreign slave-trade should not be prohibited before 1808; (2) no tax or duty may be laid by Congress on articles exported from any state; (3) no preference may be given by any regulation of commerce or revenue to the ports of one state over those of another; and (4) vessels bound to or from one state may not be obliged to enter, clear, or pay duties in another state. The first of these restrictions was only temporary, and the third and fourth have operated merely to prevent discrimination against the commerce of any state or group of states. Only the second—which was a concession to the southern exporters of agricultural products, designed to shield them from the burden of a tax whose weight was supposed to fall on the exporter himself—has proved a serious limitation upon congressional regulative authority. Export taxes, if allowed, might have been employed at times not only to obtain revenue but to conserve natural resources by checking shipments of lumber, oil, coal, and other products out of the country. There is, however, nothing in the con-

Limita-  
tions

<sup>1</sup> See pp. 81-82 above.

<sup>2</sup> Art. I, § 8, cl. 3.

CHAP.  
XXVIIImportance  
of national  
control  
over  
commerce

stitution to prevent regulation of the export trade by Congress in any way other than by taxation.

Probably no single clause of the constitution has contributed so much to the expansion of the power of the national government, especially in the past fifty years, as the commerce clause. Apart, furthermore, from the taxing clause, no grant of power has had so much to do with establishing the close relation now existing between government and business—a relation which is likely to grow more, rather than less, intimate as the commercial enterprises of our people increasingly transcend state boundaries.<sup>1</sup> It is one of the marvels of our governmental system that a constitution drawn up to meet the simple commercial needs of the eighteenth century, when pack-horses and sailing vessels were the main agencies of transportation, and when railroads, steamships, telegraphs, and telephone and wireless systems were as yet undreamed of, should have proved adequate to enable Congress to deal with the infinitely more complex commercial activities of the twentieth century without the alteration of a single word or phrase pertaining to trade regulation. The explanation is to be found in the broad interpretation which the Supreme Court has from time to time given to the words "commerce" and "regulate." Beginning with the famous case of *Gibbons v. Ogden*<sup>2</sup> in 1824, the court has so expanded the application of these terms in successive decisions (which have almost exactly synchronized with the great advances in the modes of commerce and communication) that the regulative powers of Congress have kept pace fairly well with the nation's requirements.

Meaning  
of "com-  
merce"

Thus it has come about that the term "commerce" now includes not only the exchange of commodities but such varied forms of intercourse as navigation, the maintenance of toll-bridges or ferries for passengers crossing rivers separating two states, the transportation of persons, animals, and goods by land, water, or air;<sup>3</sup> and even the transmission of intelligence by means of telegraphic, telephonic, or wireless messages, including radio broadcasting. Over

<sup>1</sup> This growing relation, in turn, partly explains why questions which are primarily economic rather than political in the strict sense have come to be the overshadowing issues in national politics since the close of the Reconstruction period. See Chap. XII above. Cf. J. T. Flynn, "Business and the Government," *Harper's Mag.*, CLVI, 409-415 (Mar., 1928); D. Lawrence, *The Other Side of Government* (New York, 1929).

<sup>2</sup> 9 Wheaton 1; G. C. Lay, "The Commerce Clause of the Constitution; its History and Development," *Amer. Law. Rev.*, LX, 161-180 (Mar.-Apr., 1926).

<sup>3</sup> For the air commerce act of 1926, see *Code of the Laws of the U. S.* (1926), pp. 2119-2123; *Columbia Law Rev.*, XXVII, 989-996 (Dec., 1927); *Amer. Bar Assoc. Jour.*, XII, 371-376 (June, 1926).

all of these matters, the regulating power of Congress extends. Furthermore, Congress not only may regulate all the instrumentalities of commerce, but may itself create corporations to serve as such instrumentalities. In short, as a result of judicial decisions, congressional authority may be said to extend to all forms of traffic and intercourse between the inhabitants of the United States and of foreign countries and between inhabitants of the different states. It includes the power to enact all legislation appropriate for the protection and advancement of that commerce—"to adopt measures to promote its growth and insure its safety, to foster, protect, control, and restrain."<sup>1</sup>

CHAP.  
XXVII

It is to be noted, however, that transactions are not to be regarded as commercial if the element of transportation is lacking. Agriculture, mining, fishing, and manufacturing are not considered commerce, and hence are not subject to congressional regulation under the commerce clause. On the other hand, there are transactions which seem, to the layman at least, to be quite as closely related to commerce as some of the things which have been held to be included in that term, but which the Supreme Court has thus far regarded only as incidents or aids to commerce and not as themselves commercial acts or instrumentalities. For example, the buying and selling of bills of exchange has been held not to be commerce; likewise the issuing of fire, marine, or life insurance policies, or other contracts.<sup>2</sup>

Along with the power to regulate foreign and interstate commerce, Congress is given authority to regulate commerce with the Indian tribes. This grant was of some importance in our early history, but it may now be passed over with the barest mention. Of far greater significance are those phases of congressional authority which have to do with the regulation of commerce (a) with foreign nations and (b) among the several states; and each of these will be given somewhat detailed treatment in the remainder of this chapter.

Branches  
of the  
commerce  
power

Although these grants of power are conferred in the same terms, the scope of congressional authority over foreign commerce is in reality the broader of the two. This is explained by the fact that the national government has exclusive, and practically unre-

Foreign  
relations  
and the  
commerce  
power

<sup>1</sup> Chief Justice Hughes, in *Texas and N. O. R. v. Brotherhood of Railway and Steamship Clerks*, 50 Sup. Ct. Rep. 427 (1930).

<sup>2</sup> W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), II, Chap. XLIII. See also J. M. Beck, "The Federal Regulation of Life Insurance," *No. Amer. Rev.*, CLXXXI, 191-201 (Aug., 1905).

stricted, jurisdiction over our relations with foreign nations, and this jurisdiction serves in no small measure to reënforce or supplement the authority granted by the commerce clause.<sup>1</sup> Thus, for example, the laws controlling the immigration of aliens may be upheld either as regulations of foreign commerce or as expressions of the national government's exclusive control over foreign relations. A similar dual legal foundation underlay the creation, during the recent war, of the War Trade Board, to which was given jurisdiction over practically all foreign trade.<sup>2</sup>

Congressional authority to regulate commerce with foreign nations attends and surrounds every voyage or other act of transportation across the national boundaries, even when commencing or terminating at a remote interior point; and inasmuch as the constitution denies to the states the right to tax imports, congressional authority continues to operate until the importer has either sold the original package or has broken the package for the purpose of selling its contents. Only when the original package or its contents have thus become commingled with the ordinary property of the citizens of the state does the controlling authority of Congress cease and that of the state begin.<sup>3</sup>

Acts  
regulating  
foreign  
commerce

In the exercise of this regulative power, Congress has passed many kinds of laws, of which only a few of chief importance can be mentioned here.<sup>4</sup>

1. Em-  
bargoes

Under the power to "regulate" foreign commerce, Congress has, on several occasions, gone so far as to attempt temporarily to put an end to such commerce, wholly or partially, by authorizing the establishment of embargoes. This policy has usually been adopted in anticipation of, or in connection with, war with some foreign power.<sup>5</sup>

<sup>1</sup> Willoughby, *op. cit.* (2nd ed.), II, 724.

<sup>2</sup> It should be observed in this connection that there is a possibility of conflict between the treaty-making organs and Congress over the regulation of foreign commerce. Although the matter appears to have been placed exclusively in the hands of Congress, treaties may contain provisions tantamount to regulations of commerce, and even inconsistent with existing tariff laws. Congressional power over foreign commerce is further reënforced by the clause which authorizes Congress to define and punish piracies and felonies on the high seas (Art. I, § 8, cl. 10). See C. F. Burdick, *The Law of the American Constitution*, 71-77.

<sup>3</sup> *Brown v. Maryland*, 12 Wheaton 419 (1827). See J. P. Hall, *Constitutional Law*, 274-282.

<sup>4</sup> Most of the laws regulating foreign commerce which are now in force may be found in *U. S. Compiled Statutes* (1918), pp. 1217-1352; *ibid.* (1923), pp. 40-41, 512-538; *Code of the Laws of the U. S.* (1926), pp. 351-387.

<sup>5</sup> Embargoes were laid in 1794, 1807-08, and 1812; also during the recent World War upon commerce destined for neutral countries whose neutrality was suspected.

Another species of regulation has taken the form of tonnage duties,<sup>1</sup> or taxes based upon the cubical capacity of vessels arriving in American ports from foreign countries. Fiscal motives have been less conspicuous in such regulations than the desire to aid American shipping, either by imposing heavier duties upon ships built or owned in foreign countries than upon American vessels, or by imposing discriminating duties upon foreign goods imported in any but American vessels. Occasionally, also, such duties have been resorted to by way of retaliation for discriminations against American ships or trade by foreign countries. Where this has been the principal motive, the president has usually been authorized to suspend the duties when discrimination against American ships or goods could be shown to have ceased. An act of 1909 imposed a duty of two cents a ton (not to exceed ten cents in any one year) at each entry of vessels from any foreign port in North and Central America, the British West Indies, or the northern part of South America. A duty of six cents a ton (not to exceed thirty cents in any one year) was imposed on vessels from other foreign ports; and an annual tonnage tax was also levied upon foreign-built vessels or yachts used for pleasure purposes.<sup>2</sup>

Navigation and inspection laws, enacted by the first Congress and on numerous occasions since, form perhaps the largest and most varied single class of strictly commercial regulations.<sup>3</sup> Chief among the varied purposes of these statutes have been protection of American shipping, stimulation of shipbuilding, safeguarding the health and safety of passengers, and insuring the safety and rights of seamen. All vessels owned by American citizens must be registered in the bureau of navigation in the Department of Commerce, and must have a license; and no American ship may sail for a foreign port without first securing a passport to be deposited with the United States consul upon arrival at its destination. Other laws, designed to protect the health and safety of passengers, fix a minimum number of cubic feet of space to be provided for each person, require the installation of sanitary and safety appliances,

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XXVII2. Tonnage  
duties3. Navigation  
and  
inspection  
laws

<sup>1</sup> The constitution expressly forbids states to levy tonnage duties without the consent of Congress. Such permission was, however, granted in numerous instances in the early history of the country for the purpose of enabling the states to improve their harbors. When the national government assumed the work of harbor improvement, construction of lighthouses, buoys, etc., the main motive for granting such privileges disappeared.

<sup>2</sup> *U. S. Compiled Statutes* (1918), pp. 1232-1235; *Code of the Laws of the U. S.* (1926), pp. 1467-1470.

<sup>3</sup> *U. S. Compiled Statutes* (1918), pp. 1217-1232; *ibid.* (1923), pp. 534-537; *Code of the Laws of the U. S.* (1926), pp. 1470-1536.

and provide for the examination and licensing of pilots, engineers, masters, and mates. Still other enactments, notably the La Follette seamen's act of 1915, define and regulate in great detail the respective rights and duties of officers and seamen.<sup>1</sup>

4. Laws  
developing  
a merchant  
marine

As a spur to shipbuilding, the government has sometimes granted subsidies, directly or indirectly, to private companies. The most important step of this kind was taken in 1916 when Congress created the Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and a merchant marine. Under the supervision of this board, acting mainly through a subsidiary organization, the Emergency Fleet Corporation,<sup>2</sup> a merchant marine was built up with such rapidity that by 1920 it was not far below the merchant fleet of Great Britain. In that year and in 1928, Congress passed merchant marine acts<sup>3</sup> enlarging the Shipping Board from five to seven members,<sup>4</sup> and expanding its powers along lines more directly related to the promotion of peacetime commerce. Besides assisting to build up the coastwise trade and trade between the continental United States and the island dependencies, the board may establish steamship lines between the United States and foreign countries, prescribe the size, type, and speed of vessels in such service, and regulate the frequency of sailings. It has also been authorized to extend financial aid in the construction of ships in privately owned shipyards.

5. Laws  
stimulating  
foreign  
trade

Shortly after the armistice,<sup>5</sup> Congress, with a view to promoting the export trade of the country, revived the War Finance Corporation, which it had created for the financial assistance of concerns whose operations were deemed essential to the successful prosecution of the war, and clothed it with entirely new powers.<sup>6</sup> With a capital stock of five hundred millions, the Finance Corporation was empowered to make short-term loans aggregating a billion dollars to aid persons, firms, or corporations engaged in the export business.<sup>7</sup> For the furtherance of our foreign commerce, and to act, if

<sup>1</sup> Most of these regulations also apply to coasting vessels and to shipping on the Great Lakes when engaged in interstate commerce.

<sup>2</sup> In 1927, the name was changed to United States Shipping Board Merchant Fleet Corporation.

<sup>3</sup> *U. S. Compiled Statutes* (1923), pp. 519-534; *Code of the Laws of the U. S.* (1926), pp. 1530-1546, and Supplement III (1929), pp. 451-455.

<sup>4</sup> The members of the board are appointed by the president and Senate for six-year terms, and receive salaries of \$12,000.

<sup>5</sup> In March, 1919.

<sup>6</sup> *U. S. Compiled Statutes* (1918), pp. 460-463; *ibid.* (1923), pp. 177-182; *Code of the Laws of the U. S.* (1926), pp. 381-385.

<sup>7</sup> In 1921, the corporation was empowered to make loans for agricultural purposes also. On April 5, 1929, the War Finance Corporation ceased to exist.

required, as fiscal agents of the United States, Congress as early as 1913 authorized national banking associations having a capital and surplus amounting to \$1,000,000 to establish branches in foreign countries or in American dependencies. In 1919, it went farther and authorized the organization, under federal charters, of private corporations for the purpose of engaging in international or foreign banking and other financial operations, subject to regulations to be laid down by the Federal Reserve Board. With the approval of that board, such corporations may also purchase and hold under certain limitations the capital stock of non-competing domestic or foreign trading corporations.<sup>1</sup>

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Tariff laws are the regulations of foreign commerce with which the ordinary citizen is probably most familiar. When the main object of such laws has been the protection and stimulation of home industries, rather than the production of revenue, their legal justification is to be found quite as much in the power to regulate foreign commerce as in the taxing power of Congress.<sup>2</sup>

6. Protec-  
tive tariffs

Laws which restrict or otherwise regulate foreign immigration into this country have, similarly a twofold legal basis. Over all matters relating to immigration, the national government has exclusive jurisdiction,<sup>3</sup> both by reason of the power granted in the commerce clause and also by virtue of the fact that such jurisdiction is an incident of the power of a sovereign government to control its own foreign relations.<sup>4</sup> Not until 1882, however, did Congress definitely embark upon a policy of restricting the admission of aliens into the country, and of even excluding certain ones altogether. Legislation aimed at exclusion has since that date been based upon the principle of denying admission to aliens who are physically, morally, and economically below certain standards. The first law (1882) excluded only idiots, escaped convicts, and persons likely to become public charges. As successive measures were passed, the debarred classes were steadily enlarged until, under the law of 1917, no fewer than thirty grounds of exclusion were enumerated. Chief among the classes debarred are criminals, paupers and per-

7. Immi-  
gration  
laws

Its assets are being liquidated and its affairs wound up by the secretary of the treasury. See *Congressional Directory*, 71st Cong., 2nd Sess., 432-433; *Code of the Laws of the U. S.*, Supplement III (1929), p. 106.

<sup>1</sup> *U. S. Compiled Statutes* (1923), pp. 633-637; *Code of the Laws of the U. S.* (1926), pp. 292-296.

<sup>2</sup> Tariff legislation has been considered elsewhere. See pp. 553-557 above.

<sup>3</sup> *Passenger Cases*, 7 Howard 283 (1848).

<sup>4</sup> *Chinese Exclusion Cases*, 130 U. S. 581 (1889); 149 U. S. 698 (1893); also W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), I, 320-324.



sons likely to become public charges, persons afflicted with contagious or infectious diseases, persons of unsound mind, anarchists, Chinese coolies, and contract laborers. The last have been excluded since 1885, at the behest of organized labor.<sup>1</sup> Altogether, these restrictions have operated to keep out of the country from two to eight per cent annually of the aliens applying for admission. A long agitation for a literacy test finally led Congress to enact, in 1917, over the veto of President Wilson, a law adding to the foregoing classes persons who cannot read the English language or some other language or dialect.<sup>2</sup>

In 1921, further legislation resulted from the apprehension that, owing to post-war conditions in Europe, the stream of immigration, which had almost ceased to flow during the war, would soon swell to dangerous proportions. Congress adopted a new basis of restriction, known as the quota standard. The number of annual admissions from any country was not to exceed three per cent of the number of foreign-born persons of that nationality who were in the country when the census of 1910 was taken.<sup>3</sup> This law was admittedly a makeshift, designed to meet an emergency and to serve until a permanent policy could be agreed upon. Consequently, its operation was limited to about a year. Its immediate and intended effect was to cut down the number of immigrants from eastern and southeastern Europe—generally regarded as among the least desirable—and to encourage immigration from northern and western Europe.

No agreement having been reached by the date set for the expiration of this law, Congress renewed it for two years, *i.e.*, until June 30, 1924. In that year an act was passed which embodied two distinct methods of immigration control, one being limited to a three-year period (1924-27) and the other being designed to be permanent.<sup>4</sup> The yearly quota, although retained temporarily, was reduced to two per cent and based upon the census of 1890 instead of 1910, the effect of this change being to cut down the number of admissible aliens from nearly 358,000, allowed under the law of 1921, to about 164,000. The period during which this temporary plan was in operation was twice extended by Congress, so that the

<sup>1</sup> *Code of the Laws of the U. S.* (1926), pp. 131-132, 150-157.

<sup>2</sup> *U. S. Compiled Statutes* (1918), pp. 632-652; *Code of the Laws of the U. S.* (1926), p. 132.

<sup>3</sup> *U. S. Compiled Statutes* (1923), pp. 230-232. For a criticism of this law, see F. A. Kellor, "Humanizing the Immigration Law," *No. Amer. Rev.*, CCXVII, 769-784 (June, 1923).

<sup>4</sup> *Code of the Laws of the U. S.* (1926), pp. 143-150.

permanent scheme, known as the national origins plan, did not become effective until July 1, 1929.

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Admissions under the national origins formula now in force are based upon the census of 1920. A total of about 150,000 persons may be admitted annually. The number admissible each year is distributed proportionally among the different nationalities that have contributed to our national stock, a minimum of one hundred being granted to each country.<sup>1</sup> No limits are imposed upon the number of immigrants entering from North, Central, and South American countries.<sup>2</sup> On the other hand, no quotas are granted to countries whose nationals are ineligible to American citizenship. Under this arrangement, the maximum quota goes to Great Britain and Northern Ireland (65,721). The next largest quotas fall to Germany (25,957), the Irish Free State (17,853), Poland (6,524), and Italy (5,802). All other quotas are below 3,400.<sup>3</sup>

National  
origins  
plan

The administration of the immigration laws was originally left mainly to state officials. Since 1891, however, the work has been assigned to federal immigration inspectors stationed at all ports of entry and working under the supervision of a commissioner-general of immigration, who is at the head of the bureau of immigration in the Department of Labor. Immigrants who consider that they have been unjustly denied admission to the country may appeal ultimately to the secretary of labor, whose decision, in most cases, is final.<sup>4</sup> The authority of the commissioner-general was greatly enlarged in 1918 by an amendment to the immigration law authorizing him to expel from the country alien revolutionists, anarchists, advocates of sabotage, violence, or assassination, and

Immigra-  
tion  
officials

<sup>1</sup> For President Hoover's proclamation establishing the new quotas, see *U. S. Daily*, March 23, 1929, p. 175. On the way in which the quotas were computed, see S. A. Mathewson, in *N. Y. Times*, June 30, 1929.

<sup>2</sup> Strict limitation of Mexican and Filipino immigration has been vigorously advocated. See *Transactions Common. Club of Cal.*, XXII, 587-636 (Nov., 1927); XXIV, 307-378 (Nov., 1929); J. S. Stowell and C. M. Goethe, "The Danger of Unrestricted Mexican Immigration," *Curr. Hist.*, XXVIII, 763-768 (Aug., 1928); *U. S. Daily*, April 12, 1930, p. 464.

<sup>3</sup> The national origins plan was opposed by President Hoover, and he has advocated its repeal. The conflicting views over its merits may be gathered from G. W. Hinman, Jr., "National Origins: Our New Immigration Formula," *Rev. of Revs.*, LXX, 304-309 (Sept., 1924); H. P. Fairchild, "The Immigration Law of 1924," *Quar. Jour. Econ.*, XXXVIII, 653-665 (Aug., 1924); J. J. Spengler, "The Merits and Demerits of the National Origins Provisions for Selecting Immigrants," *Southwestern Polit. and Soc. Sci. Quar.*, X, 149-170 (Sept., 1929); A. B. Hart, "The National Origins Plan for Restricting Immigration," *Curr. Hist.*, XXX, 480-482 (June, 1929); *U. S. Daily*, Mar. 8, 1929, p. 43 ff; Mar. 9, p. 54; Mar. 11, p. 64; Mar. 19, p. 141.

<sup>4</sup> See L. F. Post, "Administrative Decisions in Connection with Immigration," *Amer. Polit. Sci. Rev.*, X, 251-261 (May, 1916).

other aliens who aid and abet them. Under this grant of authority was carried out the sensational deportation to Russia of the so-called "Reds" in 1919. Persons debarred for any reason under the laws are transported back to the country from which they came at the expense of the steamship company that brought them over.<sup>1</sup> Under the law of 1924, the bureau of immigration has organized a "foreign service" to assist in preventing undesirable or ineligible aliens from embarking for this country. Experienced immigration officers are now assigned to American consulates abroad in the capacity of technical advisers on immigration matters.<sup>2</sup> Not only is this an important and long-needed step toward the selection of immigrants at the source, but it has also resulted in a marked decline in the number of rejections at the ports of arrival in this country. An immigration border patrol has also been organized, with more than seven hundred border patrol inspectors, mounted and otherwise. They are charged with the duty of preventing the smuggling of aliens into the country from Canada, Mexico, and near-by islands.<sup>3</sup>

Interstate  
commerce

From what has been said one may obtain some idea of the importance and ramifications of the power granted to Congress to regulate foreign commerce. But of even greater significance, especially in broadening the powers of the national government and in explaining the government's numerous points of contact with private business, has been the coördinate grant of power to regulate commerce "among the several states," usually called interstate commerce. To this we now turn.

Definition

The regulation of commercial transactions which are begun, wholly carried on, and completed within a single state falls exclusively to the authorities of that state. But the moment such a transaction crosses a state boundary it ceases to be intrastate, and becomes interstate, commerce. Even a shipment of goods or a railroad journey beginning and ending in the same state becomes an interstate transaction, subject to congressional regulation, if at any point in the journey a state boundary line is crossed. Not only does the interstate character attach to such a shipment of goods

<sup>1</sup> See E. Freund, "Deportation Legislation in the 69th Congress," *Social Service Rev.*, I, 46-57 (Mar., 1927); R. Crawford, "The Deportation of Undesirable Aliens," *Curr. Hist.*, XXX, 1075-1080 (Sept., 1929).

<sup>2</sup> In 1930, such advisers were to be found at all of the principal sources of European immigration.

<sup>3</sup> *Report of the Commissioner-General of Immigration for 1930*, pp. 34-44.

the moment it is delivered by the shipper at the freight-office, warehouse, or depot of a common carrier, *i.e.*, a railroad, steamship, or express company, but it continues to adhere to the transaction throughout the entire journey and until the goods have been delivered to the consignee. Only then do the authorities of that state have the right to tax them or otherwise to regulate their sale or use.<sup>1</sup> It is substantially correct to say that Congress enjoys *exclusive* authority to regulate interstate commerce, and that this authority reaches to water-borne commerce as well as to commerce carried on by land, or partly by land and partly by water; indeed, wherever navigable waters form, either in their natural condition or by artificial union with other waters, a continuous highway over which commerce is carried on between two or more states, or with a foreign country, they become "navigable waters of the United States," whose use Congress may control as an incident to the power to regulate foreign and interstate commerce.<sup>2</sup> But congressional power over interstate commerce does not stop here. It extends also to persons who, or corporations which, make a business of transporting articles or persons from state to state, and likewise to their relations with their employees engaged in interstate transportation;<sup>3</sup> and this explains why Congress may legally require railway companies to equip their trains with safety appliances, to limit the number of hours of labor per day of their employees, and to grant them compensation when injured in the course of their employment.

Scope of  
national  
control

Although the bulk of interstate commerce is carried on by private persons, firms, and corporations, the national government has the right to engage in such commerce itself, and therefore to create and control companies for the construction and operation of highways, bridges, canals, railroads, and other instrumentalities of commerce. Under this authority, and backed by the financial resources of the national government, the construction of the first transcontinental railroad was begun during the Civil War. More recently (1920-24), Congress has created the Inland Waterways Corporation, under the management of the secretary of war, to carry on the operations of the government-owned inland, canal,

Corporations  
created  
by the  
government

<sup>1</sup> W. W. Willoughby, *Constitutional Law of the United States* (2nd. ed.), II, Chap. XLIII; J. P. Hall, *Constitutional Law*, 283-300.

<sup>2</sup> Willoughby, *op. cit.* (2nd ed.), II, Chap. LI. M. Starr, "Navigable Waters of the United States—State and National Control," *Harvard Law Rev.*, XXXV, 154-181 (Dec., 1921).

<sup>3</sup> See railway labor act, *Code of the Laws of the U. S.* (1926), pp. 2105-2110.

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and coastwise waterway system.<sup>1</sup> While the national government may thus create corporations whose primary purpose is to engage in interstate commerce, it may not charter those whose main business is manufacturing, nor regulate conditions under which manufacturing is carried on.<sup>2</sup> It does have authority, however, through Congress, to require manufacturing corporations chartered under state laws to take out a federal license before engaging in interstate commerce; and it may lay down conditions which must be fulfilled as a prerequisite to the granting of such licenses.<sup>3</sup>

Early laws  
affecting  
interstate  
commerce

During practically the first hundred years under the constitution, no laws were passed which could be regarded, speaking strictly, as *regulations* of interstate commerce. To be sure, appropriations and land grants were made from time to time for internal improvements, as they were then called, including the establishment and maintenance of lighthouses and buoys, the dredging of rivers and harbors, the construction and upkeep of highways, turnpikes, and bridges, and the building of canals and, eventually, railroads. But regulative provisions were almost entirely absent, and the constitutionality of such appropriations, except those for river and harbor improvements, was quite as often upheld under the postal and war powers of the government as under the commerce clause.

River and  
harbor  
legislation

Of these objects of national expenditure, only river and harbor improvement calls for more than passing notice here. Along with the sums appropriated from time to time for perfectly worthy undertakings involving the improvement of harbors on the coast and of the larger rivers of the interior, millions of dollars have been wasted, as a result of log-rolling, upon utterly worthless enterprises. Most members of Congress have been eager to obtain expenditures of national funds within their respective states and districts, in the hope of enhancing their popularity with constituents and thereby ensuring their reelection. Accordingly, the river and

<sup>1</sup> The corporation has a capital of \$15,000,000, all subscribed by the government. *Code of the Laws of the U. S.* (1926), pp. 1684-1686, and Supplement III, 482-484.

<sup>2</sup> H. Hull and T. I. Parkinson, "The Federal Child Labor Law: the Question of Its Constitutionality," *Polit. Sci. Quar.*, XXXI, 519-540 (Dec., 1916); T. R. Powell, "The Child Labor Law, the Tenth Amendment, and the Commerce Clause," *Southern Law Rev.*, III, 175-202 (Aug., 1918).

<sup>3</sup> Some twenty-five years ago, this idea of a federal license for state corporations was widely advocated as an effective means of preventing monopolies and unfair practices between competitors in interstate commerce; but no such system has yet been established by law. Cf. S. D. Houston, "Federal Incorporation," *Pol. Sci. Quar.*, XXVI, 63-97 (Mar., 1911).

harbor appropriation bill, appearing in Congress annually, long ago came to be regarded as one of the most flagrant forms of pork-barrel legislation—a reputation which placed it in the company of appropriation bills for public buildings and private pensions. Prior to the Civil War, appropriations for this purpose were kept down to a comparatively low figure, the total for that long period amounting to less than fifteen million dollars. Thenceforth, however, single river and harbor bills sometimes carried items aggregating between thirty and fifty millions.<sup>1</sup> Before the adoption of the budget system in 1921, the preparation of such bills was in the hands of the committee on rivers and harbors; but with the changes introduced that year, the task fell to the reorganized appropriations committee. At the time, it was anticipated that the new method would lead to the elimination of log-rolling and to large savings at this point to the national treasury. That such a result is by no means assured, however, appears from the fact that in 1923 the House, in opposition to the recommendations of both the budget bureau and its own appropriations committee, added to the army appropriations bill twenty-nine million dollars to be used for river and harbor work; and the Senate did not interpose objection. Nevertheless, the “pork-barrel” aspects of river and harbor acts have largely disappeared in the past few years, owing to a change in the method of making appropriations. Although Congress continues to *authorize* each separate improvement project, the appropriations to carry out these improvements are, in most instances, no longer voted for specific projects by name, but in the form of a lump sum to be expended largely at the discretion of the secretary of war and the board of engineers for rivers and harbors. If a project has been authorized of which these officials disapprove, the funds necessary to carry out the improvement may be withheld.<sup>2</sup>

Aside from river and harbor bills, little national legislation affecting interstate commerce was enacted until about forty years ago. Railroads naturally took on an interstate character at an early stage of their development; but regulation of their operations was long left entirely to the states. Only after the Civil War, when railway building set in on a greatly enlarged scale and the inadequacy of state regulation became increasingly manifest, was a movement started for national control. One plan looked to detailed

<sup>1</sup> H. B. Fuller, “American Waterways and the Pork Barrel,” *Century Mag.*, LXXXV, 386-396 (Jan., 1913).

<sup>2</sup> *Code of the Laws of the U. S.* (1926), pp. 1078-1090. See 45 *U. S. Statutes at Large*, 1379-1380, for the river and harbor act of 1929.

regulation of rates and services directly by Congress; and for ten years after 1878, a bill of this general purport appeared in the House of Representatives at practically every session. A less radical proposal was to create a commission, on the analogy of various state commissions,<sup>1</sup> with power to gather information, hear complaints, and make detailed application of such general rules as Congress should lay down. And after long wavering between the two policies, Congress adopted the latter, in 1887, being impelled to that action by a startling decision of the Supreme Court in the *Wabash Case* in the preceding year, to the effect that no state had a right to adopt regulations affecting the movement of commerce among the several states.<sup>2</sup> The resulting measure, known as the "Act to Regulate Commerce," became the first of a long series of national statutes regulating railways and other public service corporations, with a view to preventing excessive charges, discriminations, and other unfair practices; and it both laid down principles and rules which these corporations must observe and created a commission—the Interstate Commerce Commission—to administer the restrictions and enforce obedience.

Scope of  
regulation

With numerous amendments which have greatly enlarged its original scope, the act of 1887 now applies to all interstate commerce carried on by railroads, by steamboat lines which form part of a system of railway transportation, by express companies, by sleeping-car and other private-car lines, and by pipe lines, except those for the transportation of gas and water. It applies, likewise, to bridges, ferries, car-floats, and lighters, to all terminal and transportation facilities used in the interstate transportation of persons and freight, and to all instrumentalities and facilities used for the transmission of intelligence by means of electricity, such as telegraph, telephone, cable, and wireless companies. Upon all corporations operating any of these instrumentalities of public service, and especially upon carriers, numerous restrictions are imposed, each of which reflects some earlier abuse.<sup>3</sup> Thus, (1) rates for the transportation of persons and freight and for the transmission of messages must be just and reasonable; (2) rebating, directly or indirectly, and undue discrimination or preferences between persons or localities are prohibited under severe penalties; (3) charg-

Restric-  
tions  
imposed on  
carriers

<sup>1</sup> The first such body was the Massachusetts railroad commission, created in 1869. By 1885 there were similar agencies in thirteen states.

<sup>2</sup> *Wabash, etc., Railway Co. v. Illinois*, 118 U. S. 557 (1886).

<sup>3</sup> *U. S. Compiled Statutes* (1918), pp. 1352-1389; *Code of the Laws of the U. S.* (1926), pp. 1649-1684.

ing a higher rate for a short haul than for a long one over the same line in the same direction is prohibited, except in certain special instances, when authorized by the Interstate Commerce Commission; (4) free transportation may be granted by carriers only to narrowly restricted classes of persons; (5) railroad companies may not transport commodities, except timber and its products, in the production or manufacture of which they have a direct property interest; (6) pooling of freights by competing railways was prohibited until 1920, when the law was amended so as to empower the Interstate Commerce Commission to authorize pooling arrangements under certain conditions; (7) common carriers are prohibited, except in a few special cases, from operating, owning, or controlling, or having any interest in, any competing carrier by water; (8) carriers are prohibited from issuing stocks, bonds, or other securities without the previous consent of the Interstate Commerce Commission.

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In addition to these restraints, numerous positive duties also have been imposed. For example, (1) printed schedules of rates must be kept open for public inspection, and changes therein may be made only after permission has been granted by the Interstate Commerce Commission; (2) to this commission full and complete annual reports must be made, covering such matters, and arranged in such form, as the commission prescribes; (3) all accounts must be kept according to a uniform system, authorized by the commission; (4) in case of injury to any of its employees, a carrier must grant pecuniary compensation, unless the accident was caused by the willful act or negligence of the injured party; (5) carriers are prohibited from employing, in interstate commerce, despatchers and trainmen longer than nine and sixteen hours, respectively, within any period of twenty-four hours; (6) eight hours has been fixed as a standard or basic work-day for railway employees engaged in the operation of trains, and carriers are obliged to conform their wage schedules to this standard, and to grant overtime pay for work done in excess of eight hours;<sup>1</sup> (7) railroad companies are required to equip all trains engaged in interstate commerce with automatic safety appliances.

Duties  
imposed

The frequent mention of the Interstate Commerce Commission—which is the administrative board charged with the enforcement of all the regulations just indicated, and of innumerable minor ones

Interstate  
Commerce  
Commission  
and its juris-  
diction

<sup>1</sup> T. R. Powell, "The Supreme Court and the Adamson Law," *Univ. of Penn. Law Rev.*, LXV, 1-27 (May, 1917).



as well <sup>1</sup>—suggests that the effectiveness of the regulations depends in a large degree upon the integrity, independence, and individual efficiency of members of the commission, upon their knowledge of the facts involved in the highly intricate and technical problems coming before them, and especially upon the wisdom with which they use their discretionary authority in applying the laws so as to benefit the general public, and at the same time to work no real injustice to the carriers and other corporations concerned. The commission, as we have seen, was established by the original regulating act of 1887. For a long time, its jurisdiction was practically limited to interstate railroads. But in 1906 express and sleeping-car companies and the owners of pipe lines, except those for the transmission of gas and water, were brought under its control.<sup>2</sup> In 1910, its jurisdiction was extended to embrace corporations operating cable, telegraph, telephone, and wireless systems.<sup>3</sup> In 1913, it was instructed to institute and supervise the huge task of making an inventory, or "physical valuation," of all property in the country belonging to interstate carriers. And still more recent legislation has authorized it to prepare and adopt, as soon as practicable, plans for the consolidation of railway properties into a limited number of systems—a project which is admittedly a step in the direction of a possible future creation of consolidated regional transportation systems, with partial decentralization in their supervision and control.<sup>4</sup> Still other statutes, notably the Clayton Anti-

<sup>1</sup> For a more extended summary of the duties of the commission, see any recent edition of the *Congressional Directory*.

<sup>2</sup> F. H. Dixon, "The Interstate Commerce Act as Amended," *Quar. Jour. Econ.*, XXI, 22-56 (Nov., 1906).

<sup>3</sup> Foreign and interstate air commerce is regulated by the secretary of commerce under the Air Commerce Act passed in 1926. See p. 586, n. 1, above. The regulation of radio broadcasting was brought under federal authority by a radio control act passed in February, 1927. This law is administered by a radio commission of five persons, appointed by the president and Senate for six-year terms, with the secretary of commerce acting as the executive officer of the commission. The commissioners receive salaries of \$10,000. W. J. Davis, "The Radio Act of 1927," *Virginia Law Rev.*, XIII, 611-618 (June, 1927); *Code of the Laws of the U. S.*, Supp. III (1929), pp. 457-464; *U. S. Daily*, Dec. 17, 1929, p. 2769; Dec. 20, p. 2817 ff.

<sup>4</sup> A "Tentative Plan of the Commission," published August 3, 1921, called for nineteen great regional systems. For this plan and the report of Professor Ripley upon which it is based, see 63 *Interstate Commerce Commission* 455 ff. (1921). See also *Amer. Econ. Rev.*, Supp., XIV, 42-108 (Mar., 1924), series of articles on railway consolidation; W. Z. Ripley, "On with Railway Consolidation," *World's Work*, LII, 41-48 (May, 1926); *Congressional Digest*, VI, 75-96 (Mar., 1927), "The Problem of Railroad Consolidation." Little, however, has been effected under this plan, and late in 1929 the commission published a new scheme of consolidation, providing for twenty-one great systems. The text of this plan, with maps, appears in the *U. S. Daily*, Dec. 23,

Trust Act of 1914 and the Transportation Act of 1920, have materially added to the commission's duties and responsibilities. As a result of this steady augmentation of activities, the commission has been increased from five to seven, nine, and finally eleven, members,<sup>1</sup> and a staff of nearly nineteen hundred persons—clerks, attorneys, examiners, statisticians, investigators, and technical experts—has been built up. The staff is organized in twelve major bureaus,<sup>2</sup> each under a director or chief who reports directly to a commissioner or to the full commission. The commission itself is also divided into six divisions, with reassignments at comparatively brief intervals. The commissioners work mainly in Washington; yet they often go out, singly or in groups, to gather information and hold hearings in distant parts of the country.

Under the original law, the commission did not have the power to make rates, either upon its own initiative or upon the complaint of shippers that existing rates were unreasonable. Ultimately, however—although only after a vigorous campaign of popular education, and in the face of persistent opposition from the carriers—the necessity of conferring upon the commission extensive rate-making power was brought home to the national mind. Under laws passed in 1906 and 1920, the commission has been empowered, on complaint and after hearing, not only to fix “just and reasonable” rates, regulations, and practices, but also to prescribe definite maximum or minimum, or both maximum and minimum, charges.<sup>3</sup> The result has been to make the Interstate Commerce Commission “the economic supreme court of the American transportation world.”

Power  
over rates

Not only does the commission enjoy quasi-judicial power in the determination of rates; it has extensive inquisitorial powers as well. It may investigate the manner in which the carriers and other corporations under its jurisdiction comply with the requirements of law; it may compel the attendance of witnesses and the production of evidence; and, through the Department of Justice, it may institute prosecutions for any violation of the law or failure to comply with the commission's orders in enforcing the law. And, 1929, pp. 2849 and Supp.; Jan. 2, 1930, Supp. Cf. S. P. Simpson, “The Interstate Commerce Commission and Railroad Consolidation,” *Harvard Law Rev.*, XLIII, 192-250 (Dec., 1929).

Procedure

<sup>1</sup> Appointed by the president and Senate for four-year terms, with salaries of \$12,000.

<sup>2</sup> These bureaus are as follows: accounts, finance, formal cases, informal cases, inquiry, law, locomotive inspection, safety, service, statistics, traffic, and valuation.

<sup>3</sup> *U. S. Compiled Statutes* (1923), pp. 560-561; *Code of Laws of the U. S.* (1926), pp. 1660-1661.

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in addition, the commission has the broad power to "inquire into the management of the business of all common carriers," and is directed by the law to "keep itself informed as to the manner and method" by which their business is conducted.<sup>1</sup>

Anti-trust  
laws

Statutes regulating carriers and means of communication constitute by far the larger of the two main classes of interstate commerce regulations. But hardly second in importance are the acts of Congress—even though not very numerous—intended to prevent the growth of capitalistic combinations commonly known as trusts.<sup>2</sup> For more than a hundred years, the regulation of combinations which restrained trade was left entirely to the states; and whatever state action was taken rested either upon the old common-law principle that all combinations which restrain trade *unreasonably* are illegal, or upon some specific statute modifying or defining the application of the common-law rule. The prevention or regulation of such combinations did not begin to be a serious problem, demanding something more than sharply conflicting decisions of state courts and widely varying state laws, until shortly before 1890. In that year, Congress intervened for the first time, and, making use of its power over interstate commerce, passed the Sherman Anti-Trust Act, whose purpose was "to protect trade and commerce against unlawful restraints and monopolies," by declaring, in sweeping general terms, every contract, combination, or conspiracy in restraint of trade or commerce among the several states and with foreign nations to be illegal, and providing heavy penalties.<sup>3</sup> No special agency, however, was created to administer this anti-trust act, and its enforcement naturally fell to the Department of Justice, along with the execution of numerous other statutes. The result was that the law remained almost a dead letter until the government successfully prosecuted the Northern Securities Case in 1905.<sup>4</sup>

The  
Sherman  
Act (1890)

<sup>1</sup> Rate-making and other proceedings before the commission assume substantially the character of proceedings in a court of justice; the various parties are represented by their attorneys, witnesses are examined, and documentary and other evidence is submitted. The decisions are embodied in rulings and orders, which are enforceable in the federal courts in proper proceedings; and to these courts appeals may be taken by parties adversely affected. Cf. J. Bernhardt, "The Interstate Commerce Commission," *Service Monographs*, No. 18 (Baltimore, 1923).

<sup>2</sup> *U. S. Compiled Statutes* (1918), pp. 1423-1435; *Code of the Laws of the U. S.* (1926), pp. 351-361.

<sup>3</sup> G. F. Edmunds, "The Interstate Trust and Commerce Act of 1890," *No. Amer. Rev.*, CXCV, 801-817 (Dec., 1917); F. E. Leupp, "The Father of the Anti-Trust Law," *Outlook*, XCIX, 271-276 (Sept. 30, 1911).

<sup>4</sup> J. W. Garner, "The Northern Securities Case," *Annals Amer. Acad.*

During the next ten years the anti-trust law was enforced with far more energy than before. Success in the Northern Securities Case lent fresh zest. Besides, there was the impetus which came from a new investigative agency, the bureau of corporations, created in the Department of Commerce and Labor in 1903. For eleven years, this bureau was steadily engaged in investigating the interstate activities of large corporations which were outside the jurisdiction of the Interstate Commerce Commission. By giving ample publicity to the organization, resources, and peculiar business methods of these establishments, it was hoped that an effective check might be imposed upon the growth of monopolies and trusts. The evidence which the bureau obtained as the result of its inquisitorial labors was made the basis of a number of important and successful prosecutions by the Department of Justice before the bureau went out of existence in 1914.<sup>1</sup> In deciding some of these cases, the Supreme Court found it necessary, notwithstanding the unqualified language of the anti-trust law, to distinguish between combinations which, in the Court's opinion, effected only a "reasonable," and those which amounted to an "unreasonable," restraint of interstate or foreign trade. In the cases against the American Tobacco Company and the Standard Oil Company, in 1911, for example, the Court applied this "rule of reason" and in effect read into the law declaring illegal "every" combination, etc., in restraint of trade, the word "unreasonable," after the word "every." The effect was practically to reverse or overrule earlier decisions in which the Court had held that *all* such combinations in restraint of trade came within the inhibition of the statute.<sup>2</sup>

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Bureau of  
corporations

The "rule"  
of reason"

The decisions in the two cases just mentioned brought clearly before the public the fact that if the anti-trust law applied only to "unreasonable" combinations and contracts, some means ought to be provided whereby well-intentioned combinations might know definitely whether they would be regarded by the government as

Need for  
further  
legislation

*Polit. and Soc. Sci.*, XXIV, 123-147 (July, 1904). Before this, the Supreme Court had held that the anti-trust law did not prohibit combinations of manufacturers, in *United States v. E. C. Knight Co.*, 156 U. S. 1 (1894); but that railway combinations were prohibited by it, in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897), and *United States v. Joint Traffic Association*, 171 U. S. 505 (1898). See, however, *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211 (1899).

<sup>1</sup> G. W. Wickersham, "The Enforcement of the Anti-Trust Law," *Century Mag.*, LXXXIII, 616-622 (Feb., 1912).

<sup>2</sup> H. R. Seager, "The Recent Trust Decisions," *Polit. Sci. Quar.*, XXVI, 581-614 (Dec., 1911).

"reasonable," and therefore lawful, without first being subjected to a criminal prosecution to determine their legal status. For the satisfactory and expeditious decision of such questions, the ordinary courts of justice are obviously ill-fitted; the large amount of investigative work involved could better be carried on, it was argued, by an administrative commission, similar to the Interstate Commerce Commission. At the same time, an insistent demand sprang up for such clarification of the anti-trust law as would indicate specifically the kinds of contracts which the government would regard as unreasonable restraints upon trade. Furthermore, since the dissolution of the tobacco and oil trusts had been based largely upon their unfair competitive methods, a simultaneous demand arose for incorporating in the anti-trust law an enumeration of all competitive practices which the government deemed unreasonable or unfair, and therefore illegal, rendering the party employing them liable to prosecution.<sup>1</sup> As an alternative, it was proposed to leave the determination of what constituted fair and unfair practices in specific cases, as well as what constituted reasonable and unreasonable restraints upon trade, to an administrative commission clothed with quasi-judicial powers and working along lines similar to those followed by the Interstate Commerce Commission in determining the justness and reasonableness of railway rates. The result was the enactment, in 1914, of the Clayton Anti-Trust Law and the law creating the Federal Trade Commission and transferring to it the personnel, powers, and authority of the bureau of corporations, which thereupon ceased to exist.<sup>2</sup> The anti-trust law was not repealed or weakened in any essential point; its enforcement was not to be abated in the least where combinations were found to exist which, in the judgment of the commission, were unreasonable or which were based upon "unfair competitive methods."<sup>3</sup> All cases of this sort were to be reported to the Department of Justice for prosecution as formerly.

<sup>1</sup> W. S. Stevens, "Unfair Competition; a Study of Certain Practices and their Relations to the Trust Problem in the United States," *Polit. Sci. Quar.*, XXIX, 282-306 (June, 1914).

<sup>2</sup> *U. S. Compiled Statutes* (1918), pp. 1429-1435; *Code of the Laws of the U. S.* (1926), pp. 356-361. See J. A. Fayne, "The Federal Trade Commission; the Development of the Law Which Led to Its Establishment," *Amer. Polit. Sci. Rev.*, IX, 57-75 (Feb., 1915); G. Hankin, "The Jurisdiction of the Federal Trade Commission," *California Law Rev.*, XII, 179-205 (Mar., 1924).

<sup>3</sup> In view of changed economic conditions, a strong case can be made out in favor of modification of the anti-trust law, which has been on the statute books for forty years. See F. H. Levy, "The Sherman Law is Outworn. It

Placed before 1914, prop on  
Department of Justice on  
Federal Trade Commission

Federal  
Trade  
Commis-  
sion

Upon the Federal Trade Commission is imposed the very important duty of (1) preventing persons and corporations (except banks and common carriers) from using unfair methods of competition in commerce; (2) conducting investigations of, and requiring reports from, corporations engaged in interstate commerce (except banks and common carriers); (3) investigating the compliance by defendant corporations with anti-trust decrees issued by federal courts; (4) reporting, at the direction of the president or either house of Congress, the facts relating to alleged violations of the anti-trust laws; (5) making recommendations for the readjustment of the business of corporations found to be violating the anti-trust statutes; and (6) studying foreign trade conditions and practices affecting the foreign trade of the United States, and reporting recommendations to Congress.

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of the  
commis-  
sion

This new commission, like its prototype, the Interstate Commerce Commission, is outside, and quite independent of, any executive department. It consists of five persons appointed by the president and Senate for seven-year terms. It has the assistance of a staff of over four hundred persons, organized in eight separate and largely independent divisions. Space does not permit setting forth in detail the functions of these divisions, or the methods of procedure followed by the commission in the performance of its quasi-judicial duty of passing upon complaints of unfair competitive methods.<sup>1</sup> Suffice it to say that if, upon investigation, the commission finds a party guilty of unfair competitive methods or other violations of the anti-trust laws, the offenders are summoned before it and proceedings assume a quasi-judicial character, as before the Interstate Commerce Commission. A formal hearing upon the charges takes place, after which an order is issued embodying the conditions to be fulfilled if the offender wishes to come under the protection of the laws and escape prosecution before the courts. Appeals may be taken to the circuit courts of appeals, and

Should be Amended," *Virginia Law Rev.*, XIII, 597-610 (June, 1927); J. H. Williams, "The Sherman Act To-day and To-morrow," *Atlantic Mo.*, CXXI, 412-424, 845-852 (Mar., June, 1928); *U. S. Daily*, Dec. 22, 1928, p. 2606; Aug. 5, p. 1764; Aug. 6, p. 1780; *Annals Amer. Acad. Polit. and Soc. Sci.*, CXLVII, 1-202 (Jan., 1930), "The Anti-Trust Laws of the United States;" C. W. Dunn, *The Federal Anti-Trust Law* (New York, 1930).

Staff or-  
ganization

<sup>1</sup> Interesting information on these points is to be found in the commission's *Annual Reports*, together with a list of trade practices condemned by the commission. A convenient summary of the powers and duties of the commission may be found in any recent edition of the *Congressional Directory*. See also R. J. Swenson, *The National Government and Business* (New York, 1924), Chap. xxii; W. S. Holt, "The Federal Trade Commission," *Service Monographs*, No. 7 (New York, 1922).

ultimately to the Supreme Court; but an order of the commission, when accepted by the parties, or when sustained after appeal to the courts, has full force of law.<sup>1</sup>

The Congress which created the Federal Trade Commission also passed, at the same session, the Clayton Anti-Trust Act to supplement and reinforce both the Sherman law of 1890 and the Federal Trade Commission Act.<sup>2</sup> The measure sought chiefly (1) to define more clearly and forbid certain abuses, discriminations, and restraints of trade, and to empower the Federal Trade Commission to suppress them; (2) to put the injured party in such cases, and in others arising under the original anti-trust law, in a stronger position by making it easier for him successfully to prosecute his suit; and (3) to undo the effect of decisions of the Supreme Court in certain recent anti-trust cases, notably the Danbury Hatters' case,<sup>3</sup> in which the Court had declared that boycotts instituted by labor organizations were combinations in restraint of trade, and thus came within the inhibitions of the Sherman Anti-Trust Act. To meet this last situation, the Clayton Act declared that nothing in the anti-trust laws "shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . or to forbid or restrain the individual members of such organizations from carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."<sup>4</sup>

<sup>1</sup> Between 1925 and 1927, the commission was widely criticized on several grounds, but especially on account of the adoption of a new rule reducing the amount of publicity attending the filing of complaints (*Annual Report* for 1927, pp. 111-113). These criticisms, as well as estimates of the value of the commission, may be found in the following references: W. C. Redfield, "Where the Federal Trade Commission Failed," *Nation's Business*, XIII, 28-29 (May, 1925); J. L. Meehem, "A Change in Policy in the Federal Trade Commission," *Amer. Bar Assoc. Jour.*, XI, 637-642 (Oct., 1925); L. Haines, "Degeneration of the Federal Trade Commission," *Searchlight on Congress*, X, 3-22 (July, 1925); W. H. S. Stevens, "What Has the Federal Trade Commission Accomplished?," *Amer. Econ. Rev.*, XV, 625-651 (Dec., 1925); M. W. Watkins, "The Federal Trade Commission; a Critical Survey," *Quar. Jour. Econ.*, XL, 561-585 (Aug., 1926); G. H. Montague, "Anti-Trust Laws and the Federal Trade Commission, 1914-1926," *Amer. Bar Assoc. Jour.*, XIII, 328-335 (June, 1927); *U. S. Daily*, May 11, 1928, pp. 649 ff; *Annual Reports* of the commission. The most exhaustive and impartial study of the work of the commission down to 1924 is G. C. Henderson, *The Federal Trade Commission* (New Haven, 1924).

<sup>2</sup> H. R. Seager, "The New Anti-Trust Acts," *Polit. Sci. Quar.*, XXX, 448-462 (Sept., 1915).

<sup>3</sup> *Loewe v. Lawlor*, 208 U. S. 274 (1908). See also *Bucks Stove and Range Co. v. Gompers*, 221 U. S. 418 (1911).

<sup>4</sup> *U. S. Compiled Statutes* (1918), p. 1426, § 8835; *Code of the Laws of*

Before the effectiveness of these new methods of dealing with trusts, and with combinations guilty of unfair practices, could be given an extended trial, the World War came on, giving rise to conditions which, since its termination, have seemed to justify Congress in relaxing at certain points the restrictions of the anti-trust laws. Under the Webb-Pomerene Export Trade Act<sup>1</sup> passed in 1918, associations organized for the sole purpose of engaging in the export trade, together with their acts and agreements, are not to be deemed illegal under existing anti-trust laws, provided such associations and their agreements are not in restraint of trade in the United States or of the export trade of any domestic competitor of such an association; and provided, further, that they are not guilty of unfair methods of competition. The enforcement of the act falls to the Federal Trade Commission.<sup>2</sup>

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The Webb-  
Pomerene  
Act (1918)

In conclusion, it should again be emphasized that neither the Interstate Commerce Commission nor the Federal Trade Commission has any authority over commercial transactions which take place wholly within a single state. For such domestic commerce, each state provides its own regulations; and for their enforcement, practically every state has established some administrative board or commission, variously called a railway commission, public utilities commission, or commerce commission. Of a vast number of commercial transactions it is easy to say that they are wholly subject to state control, and of others it is equally easy to say that they are clearly of an interstate nature, which removes them wholly from state control. If all could be so simply classified, few, if any, causes of friction would be likely to arise between the state and national authorities over matters of commercial regulation. Much difficulty of this sort, however, has arisen, because many transactions unfortunately cannot be made to fit into either of two such mutually exclusive categories, on account of the impossibility of the *U. S.* (1926), p. 353, § 17; *United Mine Workers v. Coronado Coal Co.*, 259 *U. S.* 344 (1921); *Bedford Cut Stone Co. v. Journeymen Stone-Cutters' Assoc.* (1927), summarized in *Congressional Digest*, VI, 175-176 (May, 1927), and *U. S. Daily*, Apr. 12, 1927, p. 423; D. Y. Thomas, "Blanket Liability for Labor Unions," *Curr. Hist.*, XVI, 769-774 (Aug., 1922); F. R. Black, "How Far is the Theory of Trust Regulation Applicable to Labor Unions?," *Washington Univ. Studies*, XI, 347-408 (1924); A. T. Mason, "The Labor Clauses of the Clayton Act," *Amer. Polit. Sci. Rev.* XVIII, 489-512 (Aug., 1924), and *Organized Labor and the Law* (Durham, N. C., 1925).

Relation of  
state and  
national  
control

<sup>1</sup> *U. S. Compiled Statutes* (1918), p. 1435; *Code of the Laws of the U. S.* (1926), pp. 356-361.

<sup>2</sup> The various anti-trust prosecutions for the year ending June 30, 1930, are reviewed in *Annual Report of the Attorney-General* (1930), 17-31.



drawing a clear line between their intrastate and interstate aspects. Inevitably, therefore, many state commercial regulations which have not been intended to interfere with interstate commerce as such have, nevertheless, indirectly affected this commerce in varying degrees, and for that reason have been challenged in the federal courts as invasions of a field reserved exclusively for congressional regulation.<sup>1</sup> As a result of decisions of the Supreme Court in a large number of such cases, it may now be said that state legislation which affects interstate commerce, even indirectly, will be regarded by the Court as null and void unless it clearly falls within one or another of three narrowly restricted classes.<sup>2</sup>

Valid  
state laws  
affecting  
interstate  
commerce

The first class includes cases in which state regulation can be justified as having for its main object the public convenience of the state's citizens; as, for example, laws which, without discriminating against interstate traffic, prohibit Sunday freight trains, or require passenger trains to stop at county seats and other populous places. The second class comprises a vast number of state laws enacted under the police power for the protection of public health, morals, and safety; for example, laws requiring locomotive engineers to be examined and licensed by state authorities, regulating the heating of passenger cars, establishing quarantines against diseases, and requiring that guards be stationed at crossings and bridges. In the third class are found state commercial regulations which are primarily local in their application, although they also affect interstate commerce incidentally; for example, laws regulating pilotage<sup>3</sup> and the use of wharves, piers, and docks; laws providing for the improvement of navigable channels, for the construction of dams and bridges across navigable streams,<sup>4</sup> and for the establishment of ferries; and laws authorizing the fixing of maximum charges for storing grain in warehouses and elevators.<sup>5</sup> Only in the enactment of regulations which fall within this third class may the states be said to have concurrent jurisdiction with Congress over any phase of interstate commerce. Even such local state regulations may remain in force only so long as Congress fails to legislate upon the matters with which they deal; and they may be modified at any time, or superseded altogether, by con-

<sup>1</sup> J. P. Hall, *Constitutional Law*, 289-301.

<sup>2</sup> W. W. Willoughby, *Constitutional Law of the United States* (2nd ed.), II, Chaps. LIII-LIV.

<sup>3</sup> *Cooley v. Wardens of the Port*, 12 Howard 299 (1851).

<sup>4</sup> *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882).

<sup>5</sup> *Munn v. Illinois*, 94 U. S. 113 (1876).

gressional action. Moreover, it is not always certain that such local regulations will be sustained by the courts, even in the absence of conflicting national laws; for the Supreme Court has more than once held that the absence of national legislation upon commercial matters covered by local regulations indicates an intention on the part of Congress that these particular phases of commerce, so far as they have an interstate bearing, shall remain open and unrestricted.<sup>1</sup>

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The enormous growth in the past few years of corporations engaged in the production and distribution of electric energy seems likely to result in an important enlargement of the government's power to regulate commerce, so as to cover interstate transmission of electric power. The regulation of this new phase of interstate commerce will probably fall to the Federal Power Commission, created in 1920 under the authority of Congress to control the use of the public domain, the navigable waters of the United States, and other phases of interstate commerce.<sup>2</sup> The commission was originally composed of the secretaries of war, the interior, and agriculture, *ex-officio*; while the detailed work was attended to by field officers assigned from the engineer corps of the army, the forest service, and the geological survey, all operating under the direction of an executive secretary. In 1930, this *ex-officio* body was supplanted by a five-member bipartisan commission, appointed by the president and Senate for five-year terms.<sup>3</sup> This new body should develop into a more effective agency than the original commission proved to be.

Federal  
Power  
Commis-  
sion

The commission is the sole agency, other than Congress, for authorizing water-power development upon the public domain,<sup>4</sup> and for licensing power projects upon navigable waters outside the public domain when such projects might affect the interests of navigation. The authorization takes the form, in each case, of

Powers of  
the com-  
mission

<sup>1</sup> Recent state legislation for the regulation of interstate motor transportation has given rise to new problems as to the dividing line between state and federal jurisdiction. See C. M. Kneier, "The Regulation of Interstate Motor Transportation," *Nat. Mun. Rev.*, XVI, 510-518 (Aug., 1927); I. S. Rosenbaum and D. E. Lillenthal, "Motor Carrier Regulation: Federal, State, and Municipal," *Columbia Law Rev.*, XXVI, 954-987 (Dec., 1926); *U. S. Daily*, Jan. 18, 1928, p. 3255.

<sup>2</sup> For the Federal Power Act of 1920, see *Code of the Laws of the U. S.* (1926), pp. 440-448.

<sup>3</sup> Salaries are fixed at \$10,000. The new law will be found in *U. S. Daily*, July 23, 1930, p. 1629.

<sup>4</sup> About eighty-five per cent of the total potential water power resources of the country are located on the public domain.

a license or permit for power development. But the importance of the commission as an agency for the regulation of interstate commerce seems likely to flow more directly from the provisions in the legislation which give the commission jurisdiction, either upon complaint or upon its own initiative, to regulate the rates, services, and security issues of its licensees in interstate commerce if the states are not able to act individually or cannot agree; and also in intrastate commerce, when a state has not provided by law a commission or similar agency with authority to regulate these matters.<sup>1</sup>

Perhaps the most noteworthy extension of congressional authority over foreign and interstate commerce since the enactment of the anti-trust laws in 1914 has been the resort to the commerce clause in order to provide governmental relief for the economic depression under which the agricultural interests of the country have been suffering since the close of the World War. After prolonged discussion as to the best means of extending relief to the farmers, Congress, in 1929, passed the Agricultural Marketing Act.<sup>2</sup> This law declares it to be the policy of Congress "to promote the effective merchandising of agricultural commodities in interstate and foreign commerce, so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products." These ends are to be sought (a) by minimizing speculation, (b) by preventing inefficient and wasteful methods of distribution, (c) by encouraging the organization of producers into effective coöperative associations, and (d) by aiding in preventing and controlling surpluses in any agricultural commodity.

To carry out the declared purposes of this act, the Federal Farm Board was created, consisting of the secretary of agriculture *ex-officio* and eight other members, appointed by the president and Senate. The board is an entirely independent body, responsible

<sup>1</sup> Eight states do not regulate the rates or services of electric public utilities, and twenty-six states do not regulate security issues. Down to 1930, the Commission made very little use of this power. An extended account of the work of the commission to 1929, by O. C. Merrill, executive secretary, appears in *U. S. Daily*, April 17, 1929, pp. 382 ff; April 18, pp. 392 ff; April 19, pp. 404 ff. Cf. M. Conover, "The Federal Power Commission," *Service Monograph* No. 17 (Baltimore, 1923).

<sup>2</sup> The law may be found in *U. S. Daily*, June 7, 1929, p. 836, and *United States Code*, Pamphlet Supplement (1929), No. 3, pp. 8-16.

directly to the president, and its status is much like that of the Federal Trade Commission. The appointed members hold office for six-year terms, and receive salaries of \$12,000; one of them is designated by the president as chairman. The board is authorized to make loans to agricultural coöperatives and stabilization corporations from a revolving fund of \$500,000,000, in order to promote orderly marketing and the control of agricultural surpluses.<sup>1</sup> In view of the experimental nature of this "farm bill," as it is commonly called, the board is required to make an annual report to Congress upon the practical workings of the new system, and to recommend ways in which it may be improved.

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The text for the foregoing lengthy description of ways in which the national government has sought to regulate foreign and interstate commerce is found in a single brief provision of the constitution—the so-called commerce clause. There are, however, four other express grants of authority in that instrument which so closely concern commerce and business generally that they may be dealt with appropriately in this chapter. These four ancillary powers are: (1) the power to establish uniform laws on the subject of bankruptcy;<sup>2</sup> (2) the power to fix the standards of weights and measures;<sup>3</sup> (3) the power to promote the progress of science and the useful arts by granting patents and copyrights;<sup>4</sup> and (4) the power to establish post-offices and post-roads.<sup>5</sup>

Ancillary  
commercial  
powers:

Bankruptcy is one of several subjects on which the national and state governments have concurrent legislative power. For a long time, it was left largely or entirely to state control.<sup>6</sup> But in 1898 Congress passed an elaborate bankruptcy act,<sup>7</sup> with the result that

1. Legisla-  
tion on  
bankruptcy

<sup>1</sup> See C. W. Holman, "The Farm Board at Work," *World's Work*, LVIII, 81-86 (Oct., 1929); J. E. Boyle, "The Farm Board in Action," *Rev. of Revs.*, LXXXI, 67-71 (Jan., 1930); V. P. Lee, "The Federal Farm Board and the Agricultural Credit System," *Southwestern Polit. and Soc. Sci. Quar.*, XI, 47-54 (June, 1930); L. J. Dickinson and A. Legge, "The Federal Farm Board's First Year," *Curr. Hist.*, XXXII, 1130-1137 (Sept., 1930); E. A. Stodyk and C. H. West, *The Farm Board* (New York, 1930).

<sup>2</sup> Art. I, § 8, cl. 4.

<sup>4</sup> Art. I, § 8, cl. 8.

<sup>3</sup> Art. I, § 8, cl. 5.

<sup>5</sup> Art. I, § 8, cl. 7.

<sup>6</sup> Before the enactment of the present law, national bankruptcy laws were in force only in 1801-03, 1841-43, and 1867-78.

<sup>7</sup> *U. S. Compiled Statutes* (1918), pp. 1548-1562; *Code of the Laws of the U. S.* (1926), pp. 243-256; S. W. Dunscomb, Jr., "The Federal Bankruptcy Law," *Polit. Sci. Quar.*, XIII, 606-616 (Dec., 1898). In 1926, Congress adopted extended amendments to the act of 1898. *Code of the Laws of the U. S.* (1926), pp. 1915-1922; R. H. Colin, "An Analysis of the 1926 Amendments to the Bankruptcy Act," *Columbia Law Rev.*, XXVI, 789-808 (Nov., 1926).

all of the former state laws on the subject have been either repealed or suspended. It is still permissible for a state to legislate on the subject. But in all cases of conflict the national law, of course, takes precedence; and this law is so comprehensive as to leave scant need of concurrent state action. Two classes of bankrupts are provided for in the act of 1898: (a) persons or corporations who voluntarily institute bankruptcy proceedings in order to obtain a distribution of their assets among their creditors and a legal discharge from their obligations; and (b) persons or corporations who, owing debts amounting to \$1,000 or over, may be forced into bankruptcy proceedings by the action of their creditors. Any person, and any corporation except a bank, a railroad, an insurance company, or a municipal corporation, may institute voluntary bankruptcy proceedings. Involuntary proceedings may be commenced against any person or corporation, with the exceptions just noted, and the further exception of farmers and wage-earners.

Proceedings in bankruptcy cases come under the jurisdiction of the federal district court of the district in which the bankrupt resides. Most of the details in a case are attended to by a referee in bankruptcy, who is appointed by the judge of the district court, and who makes detailed reports to the court from time to time in accordance with the law. After a bankrupt's assets have been inventoried and equitably distributed among his creditors, the judge enters a decree discharging him from all further legal liability for debts incurred prior to the commencement of the bankruptcy proceedings.<sup>1</sup> The Supreme Court has made it very clear, however, that the primary object of the bankruptcy law is not the discharge of the bankrupt person or corporation from legal liability, but the just distribution of the bankrupt's property among his creditors.

The standards of weights and measures which Congress has established by law are those of the metric system, the use of which is optional, and the pound, yard, gallon, bushel, and their deriva-

<sup>1</sup> In 1929, serious scandals were disclosed in connection with the administration of the bankruptcy law in New York City, and the Department of Justice has since been engaged upon an extensive investigation of the bankruptcy law and practice. In the opinion of the solicitor-general of the United States, T. D. Thacher, the bankruptcy law, in its present form, is "perfectly designed to promote inefficiency in the administration of bankrupt estates, to grant discharges without investigation . . . and to encourage dishonesty and reckless disregard of business integrity on the part of large numbers of people. . . ." For further criticisms of the system, see *U. S. Daily*, Aug. 22, 1930, p. 1952; *Amer. Bar Assoc. Jour.*, XVI, 431-435, 493-496 (July, Aug., 1930); H. Remington, "American Bankruptcy Laws and Their Administration," *Curr. Hist.*, XXX, 404-409 (June, 1929); G. Clark, "Reform in Bankruptcy Administration," *Harvard Law Rev.*, XLIII, 1189-1216 (June, 1930).

tives.<sup>1</sup> The fundamental standards of these various units, by which all other standards throughout the United States are tested and corrected, are deposited in the bureau of standards, established in 1901 and now located in the Department of Commerce; and they are made available to the public through copies or duplicates furnished by the national government to the several state governments. Beyond this, the regulation of commercial and trade standards has been left almost wholly to state, county, and municipal laws and ordinances. The testing and research work carried on by the bureau of standards is of high value, not only to commercial, manufacturing, and engineering interests, but to the universities and other scientific institutions of the country as well.

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Our present copyright and patent laws and regulations have come into existence under the constitutional grant of authority to Congress "to promote the progress of science and the useful arts" by securing to authors and inventors, for limited periods, "the exclusive right to their respective writings and discoveries."<sup>2</sup> The administration of the copyright laws falls within the jurisdiction of the division of copyrights of the Library of Congress, and is under the immediate supervision of the register of copyrights.<sup>3</sup> The patent laws and regulations are administered under the supervision of the commissioner of patents, formerly located in the Department of the Interior, but transferred in 1925 to the Department of Commerce.<sup>4</sup>

3. Copy-  
rights and  
patents

Copyright has been defined as "the exclusive right secured to an author by statute to reproduce and publish his work." This exclusive right is granted for a period of twenty-eight years, with the right of renewal for an equal period. Books printed in the English language must be typeset in the United States in order to receive the protection of our copyright laws.<sup>5</sup> Copyright includes the exclusive right to translate, dramatize, and represent the work; and in the case of a musical production, the right to perform it

What may  
be copy-  
righted

<sup>1</sup> *U. S. Compiled Statutes* (1918), pp. 1447-1451; *Code of the Laws of the U. S.* (1926), pp. 374-379.

<sup>2</sup> A provision, similarly worded, appeared as early as 1683 in William Penn's "Frame of Government" for Pennsylvania.

<sup>3</sup> *U. S. Compiled Statutes* (1918), pp. 1532-1547; *ibid.* (1923), pp. 626-630; *Code of the Laws of the U. S.* (1926), pp. 449-456.

<sup>4</sup> *U. S. Compiled Statutes* (1918), pp. 1525-1532; *ibid.* (1923), p. 630; *Code of the Laws of the U. S.* (1926), pp. 1165-1173. See *Congressional Digest*, VI, 255-283 (Oct., 1927), series of articles on "The Problems of Copyright Revision."

<sup>5</sup> G. H. Thring. "The United States Copyright Law and International Relations," *No. Am. Rev.*, CLXXXI, 69-89 (July, 1905).

publicly for profit, and also to exact a fixed royalty for its reproduction by mechanical instruments. Copyright thus extends not only to books but also to works of art, charts, maps, musical compositions, cartoons, and photographs. It is granted to every person who applies in conformity with the law; the division of copyright makes no effort to ascertain whether there is any infringement of a previously copyrighted publication or production. Where such infringement occurs, the injured party is obliged to seek redress in a suit for damages, or by injunction proceedings, in the federal courts.

## Patents

Patents may be granted to any person who has invented or discovered "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country" within a period of two years prior to the filing of the application for the patent.<sup>1</sup> Patents may also be obtained by persons who, since May 23, 1930, have "invented or discovered and asexually reproduced any distinct and new variety of plant, other than a tuber-propagated plant."<sup>2</sup> Once a patent has been issued, it is out of the jurisdiction of the patent office; questions of infringement, the scope of the patent, and any other questions that arise out of the grant are determined in the federal courts. The term for which a patent runs is seventeen years. During that period, a patent-grant gives the inventor the right to exclude all others from making, using, or selling his invention; but it does not give him the right to make use of or sell his own invention if it is an improvement on some unexpired patent whose claims are infringed thereby. The protection of the patent law extends throughout the continental United States, Alaska, Hawaii, and the Canal Zone; and, upon compliance with certain regulations, to Porto Rico, the Philippine Islands, the Virgin Islands, and Guam.<sup>3</sup>

Scope of  
patent  
rights and  
copyrights

The rights secured by authors and inventors under the copyright and patent laws are clearly monopolistic: "the exclusive right to their respective writings and discoveries" is what the constitution expressly guarantees. But what is the scope of these "exclusive rights"? How far in the exercise of them may the owner of a copy-

<sup>1</sup> *U. S. Compiled Statutes* (1918), p. 1526, § 9430; *Code of the Laws of the U. S.* (1926), pp. 1165-1173.

<sup>2</sup> *U. S. Code*, Pamphlet Supplement (1930), No. 3, pp. 294-295.

<sup>3</sup> K. Fenning, "Trade Marks and the U. S. Patent Office," *Amer. Bar Assoc. Jour.*, XI, 461-464 (July, 1925).

right or patent go in imposing restrictive conditions upon the sale or use of his writing or invention? When, if at all, will the exercise of these exclusive rights bring him into collision with the anti-trust laws prohibiting contracts in restraint of trade? These and other similar or related questions have several times been before the Supreme Court for decision; and they have received somewhat inconsistent answers<sup>1</sup> In a rotary mimeograph case, for example, decided in 1912,<sup>2</sup> the Court held that patent rights include the legal right to sell the patented article under any conditions or terms which the owner of the patent may choose to impose, and that they even extend so far as to permit him to prescribe that the article shall be used only with certain materials of his own manufacture or under his control, although unpatented themselves. In this case, the owner of the mimeograph patent had required purchasers of his mimeograph machine to agree to use with it only stencil-paper, ink, and other unpatented supplies made by the owner of the patent. This decision of the Court was reached by a four-to-three vote of the justices, there being two vacancies at the time. It aroused wide criticism, for it seemed to open up the possibility of subverting, under cover of patent rights, much that had been accomplished under the anti-trust laws in checking contracts in restraint of trade.

On the other hand, when, in the following year (1913), similar questions came before a full bench of justices, involving the validity of price-fixing agreements for the sale of a patented medicine and of copyrighted books, different conclusions were reached. In the first of these cases,<sup>3</sup> the Court held that when a patentee has sold a patented article, he has placed it beyond the limits of the "exclusive rights" secured by the patent; and that contracts to maintain a standard price therefor are in restraint of trade and accordingly prohibited by the anti-trust law. The same principle was applied in the case involving an attempt by an association of publishers, who owned the copyright of certain books, to uphold and enforce, as a copyright privilege, an agreement to refuse to supply their copyrighted books to retailers who sold them for less than the standard price fixed by the publishers.<sup>4</sup> The Court held that owner-

Price-fixing  
under  
patents  
and copy-  
rights

<sup>1</sup> J. T. Young, *The New American Government and its Work* (1913), pp. 154-160.

<sup>2</sup> *Henry v. A. B. Dick Company*, 224 U. S. 1.

<sup>3</sup> *Bauer and Co. v. O'Donnell*, 229 U. S. 1 (usually called the Sanatogen case).

<sup>4</sup> *Straus and Straus v. American Publishers Assoc. et al.*, 231 U. S. 222.



ship of a copyright gives publishers no control over the books after they have sold them to a retailer; that the latter, having made them his property, can re-sell them at any price; and that the anti-trust laws prohibit agreements among copyright owners to refuse to sell to persons who re-sell at less than a standard price. In 1914, Congress included in the Clayton Anti-Trust Act a clause which counteracted the possible disastrous effects of the decision in the mimeograph case by forbidding the sale or lease of patented or unpatented articles, or fixing prices therefor, "on the condition or understanding that the purchaser or lessee shall not use" the goods of competitors, "when the effect of such an agreement or lease may be to lessen competition or create a monopoly;" and in a later case (1917), the Supreme Court took exactly the opposite position from that taken in the mimeograph decision.<sup>1</sup>

4. Postal  
power

Even more clearly related to the power of Congress over commerce than are the express powers to pass uniform bankruptcy laws, establish standards of weights and measures, and grant copyrights and patents, is the power to establish post-offices and post-roads. So intimate, in fact, is the connection between commerce and the postal service that, had the express grant just mentioned been omitted from the constitution, Congress might have established a postal system under power implied in the commerce clause.

The primary function of the postal system is, of course, to collect, transport, and distribute letters, cards, newspapers, periodicals, and other mailable matter. This is an activity in which the several states once had a right to engage. Since the adoption of the national constitution, however, it has belonged exclusively to the federal government. Furthermore, all the early doubts as to the constitutional authority of Congress to *create* an elaborate postal system, instead of merely designating which of existing buildings and routes were to be used as post-offices and post-roads, have long since vanished. Under its authority both to establish post-offices and post-roads and to regulate interstate commerce, Congress has passed laws excluding from the mails lottery tickets and advertise-

<sup>1</sup> Motion Pictures Co. v. Universal Film Co., 243 U. S. 502. Cf. D. L. Podell and B. S. Kirsh, "Patent Pools and the Anti-Trust Laws," *Amer. Bar. Assoc. Jour.*, XIII, 430-434 (Aug., 1927).

In 1930, the Senate committee on patents held extended hearings upon the relation of the patent and anti-trust laws, and reported a bill, which the Senate passed, suspending the right of a patentee to enforce action for infringement of his patent so long as he is violating the anti-trust laws. The hearings are reported in *U. S. Daily*, beginning May 29, 1930. The bill, which was not acted upon by the House, will be found in *U. S. Daily*, June 3, 1930, pp. 1057 ff.

ments, the letters, papers, advertisements, or other documents of persons or corporations practising fraud and deception, and writings of many kinds which tend to encourage crime or immorality.<sup>1</sup> Matter which has thus been excluded from the mails may, however, be distributed in some other way, by private agencies, unless, as in the case of lottery tickets, its transportation in interstate commerce has been prohibited by Congress.

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To these primary functions of the postal service have been added (1) the operation of a system of money orders for the transfer of funds, (2) the maintenance of postal savings banks, and (3) the carrying on of an express business, in the form of the well-known parcel-post service. It is safe to say that no activity of the national government now touches more people, in a greater variety of ways, and more continuously. From being merely a device for the transportation of letters and a few newspapers, the service has expanded into the highly complex system which to-day employs approximately three hundred and seventeen thousand persons.<sup>2</sup> And the resources of the postal power are not yet exhausted, as is illustrated by the fact that it was the postal clause of the constitution that supplied the legal basis for the act of 1916 by which great sums of money were appropriated from the national treasury for the improvement of highways throughout the country in coöperation with the states.<sup>3</sup> The law of 1916 was entitled "An act to provide that the United States shall aid the states in the construction of *rural post-roads*, and for other purposes;" and a "rural post-road" was defined to mean "any public road over which the United States mails now are, or may hereafter be, transported," in places of less than 2,500 population.<sup>4</sup> More recent highway acts, however, have omitted this invocation of the postal clause.<sup>5</sup>

Expansion  
of postal  
functions

<sup>1</sup> *U. S. Compiled Statutes* (1918), pp. 1702-1709; *Code of the Laws of the U. S.* (1926), pp. 483-490, 1235-1286.

<sup>2</sup> The organization and operation of the Post-Office Department have been described in an earlier chapter. See pp. 351-355 above.

<sup>3</sup> See p. 626 below.

<sup>4</sup> W. Thompson, *Federal Centralization*, Chap. v. Something in the nature of a precedent for this resort to the postal clause to justify a federal highway policy is to be found in the history of internal improvements in the early decades of the past century—especially in the report of Albert Gallatin, in 1808, outlining a system of highways and canals extending from Massachusetts to Georgia.

<sup>5</sup> *Code of the Laws of the U. S.* (1926), pp. 665-670.

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## CHAPTER XXVIII

### THE EXPANSION OF NATIONAL ACTIVITIES

The widening circle of governmental functions

Any one who has cast his eye over the activities of the national government as outlined in two earlier chapters devoted to the executive departments and independent establishments<sup>1</sup> must have been conscious of a profound transition as the picture unfolded. The older departments have had to do mainly—in some cases almost exclusively—with matters of a distinctly governmental character, and, what is more, with matters falling within the range of powers expressly conferred by the constitution upon the national government, *e.g.*, the conduct of foreign relations, the collection and disbursement of national revenues, the control of the currency, the administration of the army and navy, the management of the country's judicial business, the operation of a postal system, the custody and sale of public lands. On the other hand, the newer departments—Agriculture, Commerce, Labor—and certainly most of the independent establishments, are found concerning themselves largely, or entirely, with affairs that until recent times were rarely brought within the province of governmental authorities in any country, and that under our own constitutional system lie farther and farther out upon the fringe of national jurisdiction, if not in some cases rather clearly beyond its proper limits. The result is the same if one scrutinizes the work of Congress as described in the four chapters immediately preceding the present one. Here again we start with certain plainly necessary and clearly granted powers or functions, *e.g.*, levying taxes, coining money, regulating foreign and interstate commerce, but presently find ourselves talking about creating national banks, laying protective tariffs, regulating immigration, curbing trusts, prescribing standards for highway construction. How is it that national meat inspectors to-day find themselves stationed in the slaughter-houses of the great packing establishments of Chicago? Or that a Pennsylvania farmer can receive market reports sent out from a national high-powered radio station at Arlington, Virginia? Or that a

<sup>1</sup> Chaps. XVII-XVIII above.

Gloucester fisherman can look to the government at Washington to tell him to use copper oleate as a means of preventing his nets from rotting? Or that a Mississippi planter can obtain federal aid in eradicating the boll weevil, and the Texas stockraiser in overcoming the ravages of the cattle tick?

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The answer, of course, is that a growing nation, planted in a new country, and developing in an age of exceptionally rapid technological and social change, found it desirable to permit the functioning of government to spread far beyond the narrow bounds laid down and observed in Washington's day, so as to embrace these, and many other, surprising activities. National, as opposed to state and local, authority took a long leap forward when the constitution was adopted. But, after all, this was only a beginning. For a hundred and forty years, it has continued advancing—if not always by challenging and dramatic leaps, at all events by steady, irresistible progression. There have been people to question every step that was taken. Loud protest has been voiced, in the name of states' rights, of individual liberty, and of treasured Jeffersonian concepts of government. Nevertheless, under the impact of new social and economic problems and of changing political concepts, the authority of the national government has gone on penetrating into new fields and manifesting itself in novel activities. Many of the things that have happened have been noted in earlier portions of this book. Furthermore, the means or methods employed are too familiar to require much comment. One of these, of course, is the amending of the national constitution. To be sure, most of the nineteen amendments thus far adopted have had to do with limitations upon, rather than extensions of, the national powers. But the Fourteenth Amendment imposed many restrictions upon the states at points at which they had previously been free; the Fifteenth and Nineteenth took important steps in the direction of nationalizing the requirements for the suffrage; the Sixteenth conferred the right to levy income taxes without apportionment; and the Eighteenth empowered the national government to prohibit the manufacture, sale, and transportation of intoxicating liquors. Other amendments looking in the same general direction, *e.g.*, on the subject of child labor, have been urged though not as yet adopted. Especially significant in this connection is the prohibition amendment. Until its adoption, in 1919, the control of the alcoholic liquor industry was regarded as a matter belonging exclusively to the states under the police power, to be dealt with by

Methods  
of growth:

1. Constitutional  
amendment

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tive enact-  
ment and  
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tionGrants-in-  
aid as  
instrumen-  
talities of  
national  
control

each of them absolutely as it chose—subject only to the recognized national power to tax and to regulate interstate commerce. The amendment, however, made prohibition national and led to the creation of a vast new piece of national administrative and enforcing machinery. It was “more than an entering wedge;” it was “a coach and four driven straight through the reserved constitutional rights of the states to regulate their domestic concerns.”<sup>1</sup>

Even so, formal constitutional amendment has played a relatively small part. Far more important has been statute, reinforced by judicial construction. It is the doctrine of implied powers, as generously (some people would say extravagantly) applied by the Supreme Court, that has opened the way for the growth of the mighty investigative, regulative, and administrative system that centers in Washington to-day. But for this, there would be no pure food and drug acts, no meat inspection acts, no rural credit act, no white slave act, no narcotic drug act, no federal water power act. But for this, there would be no Federal Trade Commission, no Federal Power Commission, no Federal Reserve Board; and if there were departments of Agriculture, Commerce, and Labor at all, they would have such modest functions as to be hardly worthy of notice. We have seen that the concept of implied powers began turning the activities of the national government in new and unexpected directions as early as Washington's first administration.<sup>2</sup> Since that time, it has so revolutionized our thinking on constitutional matters that, notwithstanding the limits expressly imposed upon national authority, it is a fair question whether Congress may not, with full propriety, authorize and make financial provision for a new government service or activity simply on the strength of its power to appropriate money, and without any other express or implied provision in the constitution on which to base its action.

Extensions of national control may, of course, take the form of regulations imposed upon the country directly and solely by the national government. On the other hand, they may be achieved through coöperative arrangements entered into with the states under which, in return for financial assistance, the national government gains the right to impose regulations and standards, and to inspect the work performed, in various stipulated fields of state activity. So important has been this second method in the last fifteen or twenty years that something must here be said about it.

<sup>1</sup> W. MacDonald, *A New Constitution for a New America*, 173.

<sup>2</sup> See p. 108 above.

The principle of the grant-in-aid is that Congress will appropriate money for the furtherance of some social or economic improvement deemed desirable, apportioning the sum among the several states on some definite basis, but permitting a state to share in the subvention only on two conditions—first, that the state itself shall appropriate for the purpose in hand an amount at least equal to its share of the national grant, and second, that the state shall accept some degree of national control over the activities for which the money is voted. Sometimes this control amounts to requiring that the states shall enact certain legislation in order to qualify for participation in the grant; almost always it means that a state must reconstruct its administrative machinery so as to make way for supervision, and at least partial direction, by national officers of matters that formerly were entirely in its own hands. No direct compulsion is exercised. A state may, if it likes, decline to meet the conditions imposed, in which event it simply does not participate in the federal subsidy; and this voluntary aspect of the plan has been of great help to the courts in getting round the constitutional difficulties which some of the legislation, dealing with matters lying well outside the range of federal competence, presents. Compliance by the states is, however, less voluntary than appears. For the federal fund represents the proceeds of taxes paid by the people of the entire country, and if any state refuses to go into the arrangement, it thereby denies itself the benefits which its tax-payers are helping to bestow on the states that go in. Naturally, it will be reluctant to do this.

Grants-in-aid by the national government are, of course, by no means a novelty. Beginning with Ohio in 1802, Congress regularly bestowed on newly admitted states land within their boundaries equivalent to one section in every township, to be used for educational purposes—in fact, two sections after 1848, and even four in the cases of Utah, Arizona, and New Mexico.<sup>1</sup> Numerous other forms of land grants, applying to salt lands, swamp lands, etc., were introduced at different points in the country's history; and an especially notable piece of legislation—the Morrill Act of 1862—set aside for the benefit of each state, in proportion to its representation in Congress, a vast stretch of public land (ultimately 10,840,000 acres), stipulating that the proceeds should be used in endowing and maintaining one or more colleges devoted primarily,

Earlier  
grants of  
land and  
money

<sup>1</sup> The Congress of the Confederation had, indeed, provided in 1785 for such a subvention in the Northwest Territory.



although not necessarily exclusively, to instruction in "such branches of learning as are related to agriculture and the mechanic arts."<sup>1</sup> The funds derived from this source go far toward supporting our numerous "land-grant" colleges to-day. Not only land, but also money, was bestowed in earlier times; and not only for education, but also for roads and canals. When, indeed, in 1836 it was found that unanticipated receipts from the sale of public lands were yielding a surplus of some nine million dollars a year, a law was passed under which, in 1837, the sum of twenty-eight millions was distributed among the states in proportion to their congressional representation, in the guise of a loan, but with no expectation that it would be paid back, and with no stipulation whatever as to how it should be used.<sup>2</sup>

Since about 1885, there have been two main developments in this matter. One is the remarkable increase of the volume of the federal aid extended, and of the variety of uses to which it is put; the other is the equally remarkable extension of federal control over the use of the funds allotted. Naturally, the two have gone along together.

Extension  
of federal  
control

No field better illustrates what has happened than that of agricultural education. The Morrill Act of 1862 imposed no obligation upon any state accepting the grant beyond that of maintaining at least one agricultural college and making an annual report to Congress upon the institution's progress and upon the condition of the fund. Many of the states parted with their lands at ridiculously low prices; hence, in 1889 Congress forbade states subsequently entering the Union to sell any parts of their allotted areas at less than ten dollars an acre; and—more significantly—an act of 1890 bestowing upon the states annual money appropriations in further aid of the agricultural and mechanical colleges, directed the secretary of the interior to ascertain that the subsidized institution, or institutions, in each state were satisfactorily fulfilling their purposes before permitting the annual allotments to be paid. Federal supervision that meant something was thus introduced; and in 1907 it was further strengthened by an act increasing the subsidy and entrusting the administration of the system to the national bureau of education. Meanwhile, in 1887, Congress had given each state a lump sum for the maintenance of an agricultural experiment station; and an act of 1906 increased the allowance and

<sup>1</sup> 12 *U. S. Stat. at Large*, 503.

<sup>2</sup> E. G. Bourne, *History of the Surplus Revenue of 1837* (New York, 1885).

greatly extended federal control as exercised through an office of experiment stations in the Department of Agriculture.

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Coöpera-  
tive agri-  
cultural  
extension  
work

Then came a departure of still greater importance. About 1900, the Department of Agriculture began sending agents into the South to demonstrate improved methods of growing crops. The service was so much appreciated that in a few years counties began contributing voluntarily toward the salaries of the experts, and in 1912 an appropriation by Congress enabled the plan to be extended to northern and western states. Finally, in 1914, the Smith-Lever Act appropriated \$480,000 for 1915-16 and pledged amounts rising by stages to \$4,580,000 in 1922-23 for the purpose of giving "instruction and practical demonstrations in agriculture and home economics to persons not attending or resident in colleges in the several communities."<sup>1</sup> Each state was to receive a basic grant of \$10,000 annually, and beyond that, the subsidy of each year was to be divided among the states in the proportion which the rural population of each state bore to the rural population of all the states. This was something new. But more important still was the provision that no state should share in the distribution until it accepted the terms of the act and appropriated, or otherwise provided, a sum equal to that (beyond the basic allowance) due it from the federal grant. Here was embodied the rule of "fifty-fifty," or "matching the federal dollar," which (originally introduced in the Weeks Act of 1911<sup>2</sup> for the protection of forested watersheds) has been incorporated in practically all later legislation granting federal aid. Under the terms of the statute, supplemented by voluntary agreements, each of the agricultural colleges now maintains a distinct division for the administration of extension work in agriculture and home economics. The director of this division must be acceptable to the federal Department of Agriculture, to which all plans are submitted; and all funds for agricultural extension work, whether from national, state, or local sources, are administered through this single channel.<sup>3</sup> Locally, the activities provided for are carried on by county agents, "home demonstration" agents, leaders of juvenile work, etc.—officials and employees in whom national and state governments merge in a

<sup>1</sup> 38 U. S. Stat. at Large, 372.

<sup>2</sup> See p. 626 below.

<sup>3</sup> At first, the direction of these extension activities, on the side of the national government, was vested in a "states relations service," in the Department of Agriculture; but in 1923 this service was abolished and its work assigned to three distinct bureaus or services, i.e., the extension service, the office of experiment stations, and the bureau of home economics.

truly remarkable fashion. Their pay comes partly from the nation and partly from the state; they are responsible to the state extension director, but must conform to national regulations; they are at once expert advisers, business agents, and social workers. Appropriations made in 1928 provided for an increase of the personnel of the service by almost four thousand.

Extensive and significant as the coöperative arrangements of state and nation now are in the domain of agricultural education, they are duplicated, and in one or two instances exceeded, in other fields. A complete catalogue would be wearisome, even though instructive; but here are some outstanding examples:

1. The Weeks Act of 1911<sup>1</sup> gave the forest service in the Department of Agriculture the sum of \$200,000 to be used for fire protection on the forested watersheds of navigable streams, with the stipulation (a) that federal expenditure from the fund should not, in any state, exceed in any fiscal year the appropriation made by the state itself for the same purpose, and (b) that no state should share in the subsidy unless its fire prevention plans and methods were approved by federal officials. The conditions thus attached marked a new departure in the history of federal and state relations. The amounts involved were small; but the principle was significant, and the precedent proved momentous. Moreover, in 1924, the Clarke-McNary Act extended the arrangement (with increased appropriations) to all private and state forest lands.<sup>2</sup> On this basis, and with enlarged outlays by both nation and states, the acquisition of land for purposes of watershed protection has been going forward steadily for twenty years.

2. A Federal Highway Act of 1916<sup>3</sup> provided for appropriations rising by stages to the sum of \$25,000,000 in 1921, to be expended by the bureau of roads in the Department of Agriculture, in coöperation with the highway departments of the several states, in the construction of rural post-roads. Congress had at earlier times subsidized the states for the benefit of post-roads; but never before had the states been required to match the amounts allotted to them from the federal treasury. In line, furthermore, with the new system that was developing, national authorities were placed in substantial control of both the building and maintenance of all roads constructed on this coöperative basis. As was to be expected, the scheme proved popular in an automobile age. Every state ac-

<sup>1</sup> 36 U. S. Stat. at Large, 961.<sup>2</sup> 39 U. S. Stat. at Large, 355.<sup>3</sup> 43 U. S. Stat. at Large, 653.

cepted the provisions of the act; and under the federal impetus, road construction went forward—and is still proceeding, to an accompaniment of steadily rising appropriations<sup>1</sup>—on a scale never before witnessed in this or any other country. State highway legislation, conforming to federal requirements, has grown voluminous; and state indebtedness, incurred in carrying out the joint program, has in some instances risen to rather alarming proportions.

3. In 1916 also, a National Defense Act,<sup>2</sup> carrying farther the principle of national supervision over the military establishments of the several states embodied in the Militia Act of 1903, discarded the old term "militia," substituted the significant name "national guard," and welded the various bodies of state troops into a unified, nationally organized force auxiliary to the national army and closely tied in with it. Federal aid is extended on the same general principles as in the fields of agricultural education and highway construction; and federal standards of equipment, training, and discipline are rigorously enforced. The militia still serves the states; but it has likewise become an integral part of the war machine of the nation.

4. The Smith-Hughes Vocational Education Act of 1917<sup>3</sup> appropriated liberal sums to be employed in helping the states—again under the plan of matching the federal dollar—to pay the salaries of teachers of trade, home economics, and industrial subjects, and to train teachers, supervisors, and directors in these subjects; and additional appropriations, on a rising scale over a period of years, were made in 1928. The system operates in all of the states, and is administered by a federal board for vocational education, with powers enabling it to enforce uniform standards and methods from coast to coast.<sup>4</sup> To such an extent does the national government reach down into the states and dictate the conditions under which they may share in the subvention that it requires every participating state to designate or create a state board of vocational education. The Fess-Kenyon Vocational Rehabilitation Act of 1920<sup>5</sup> put still other funds at the disposal of the federal board, to be used in aiding the states in promoting

<sup>1</sup> The national outlay reached \$75,000,000 in 1928, or upwards of sixty per cent of all federal money actually being allotted to the states at that time.

<sup>2</sup> 39 *U. S. Stat. at Large*, 197.

<sup>3</sup> 39 *U. S. Stat. at Large*, 929.

<sup>4</sup> W. S. Holt, "The Federal Board for Vocational Education," *Service Monographs*, No. 6 (New York, 1922).

<sup>5</sup> 41 *U. S. Stat. at Large*, 735.

"vocational rehabilitation of persons disabled in industry or in any legitimate occupation, and their return to civil employment." In view of the fact that the number of people in this country suffering injury in industrial employment in a single year exceeds the total number of American soldiers incapacitated during the World War, the plan thus introduced has proved a large commitment. More liberal provision for carrying it out was made by Congress in 1930; and it is now in effect in nearly all of the states.

5. In 1921, Congress passed a measure that cut deeply indeed into the presumed control of the states over social legislation. This was the Sheppard-Towner Act,<sup>1</sup> which extended federal aid to the states in promoting the welfare of mothers and infants, on the usual condition that the states, through their legislatures, accept the terms of the measure, make appropriations, and authorize necessary administrative arrangements. Within six months after the act was passed, forty-one states entered into the plan, and by 1927 all were coöperating except three. The original act was for a five-year period only. In 1927, its operation was extended to June 30, 1929. At this date, however, the arrangement was allowed to lapse, partly as a measure of economy and partly for other reasons; and although bills reviving it (with various modifications and additions) passed both houses of Congress in 1931, efforts to bring the two bodies together on a single measure were unsuccessful. The matter seems certain to be kept alive until new legislation is secured.<sup>2</sup>

Tendency  
of the  
grant-in-  
aid system  
to expand

Without prolonging the enumeration, the general fact may be indicated that at least seven major grants, and a number of smaller ones, are nowadays made regularly from the federal treasury to those of the states that meet the conditions imposed in the respective cases, and that these entail total yearly congressional appropriations of around \$125,000,000. Furthermore, there is steady demand for extension of the system in new directions. The backward condition of elementary and secondary education in many rural sections of the country has come in for attention in this connection; and in 1931 a bill which would have subsidized the states, in aid of rural education, to the extent of \$100,000,000 annually for a period of two years failed rather because of the condition of the national treasury, and because of the lack of exact information

<sup>1</sup> 42 U. S. Stat. at Large, 224.

<sup>2</sup> G. Abbott, "The Federal Government in Relation to Maternity and Infancy," *Annals Amer. Acad. Polit. and Soc. Sci.*, CLI, 92-102 (Sept., 1930).

as to the extent of the need, than because of any overpowering objection to going farther with the grant-in-aid system. Certainly the door has been thrown wide open. Subventions having been voted for forest protection, road-building, agricultural education, vocational education, industrial rehabilitation, and the care of mothers and infants, why should not similar beneficence be extended to a dozen other social interests and activities, such as general rural education? Assuredly, there is no lack of state enterprises, existing and potential, for which an argument might be made; and certainly there is no lack of state governments and populations that would welcome still greater assistance in bearing their financial burdens. Constitutional impediments, furthermore, would seem to have been removed. Federal appropriations for, and control over, activities that in some instances can, by no stretch of the imagination, be brought within the enumerated powers of Congress have given rise to serious questionings, and have been opposed sturdily on constitutional grounds. But when, in 1924, the Supreme Court was called upon to decide two cases brought to determine the constitutionality of the Sheppard-Towner law, and of the federal subsidy system generally, that tribunal (while dismissing the cases on the ground that no justifiable issue was presented) used language which indicated plainly enough that if formal decisions had actually been rendered, they would have sustained the grant-in-aid principle at every point.<sup>1</sup>

No one who keeps touch with the deeper currents of thought and discussion in the country to-day needs to be told that the amazingly rapid expansion of national activities, so strikingly illustrated by the subsidy system just outlined, has become a major public issue. Press and platform pronounce sententiously on "federal usurpation;" a leading university president assures us that we are passing through a second American revolution;<sup>2</sup> party platforms hark back to the old question of states' rights; every great social or economic reform is discussed largely, if not primarily, from the viewpoint of its centralizing or decentralizing tendency. When the child labor amendment to the national constitution was put before the states, it immediately became the focal point for a stimulating, even if inconclusive, debate on the fundamentals of our entire American scheme of government; and undoubtedly the defeat of the proposal was to some extent due to a popular reaction against

The question of "centralization"

<sup>1</sup> *Massachusetts v. Mellon and Frothingham v. Mellon*, 262 U. S. 447.

<sup>2</sup> Nicholas Murray Butler, in *New York Times*, Oct. 14, 1924.

national domination in general, as well as to dissatisfaction with that particular form of such domination embodied in the prohibition law.<sup>1</sup> Nothing shows more plainly the perpetually shifting character of political systems, and the methods by which great changes are accomplished in our own system, than the developments going on before our very eyes in this broad field of federal and state relations.

Criticism  
of the  
present  
tendency

On the one hand, it is argued (1) that the only feasible plan for a land of continental proportions and a people of vast numbers and divergences is one—such as the makers of our constitution had in mind—which allows a large measure of local and regional (in our case, state) autonomy and restricts centralized, uniform, national control in social and economic matters to a minimum; (2) that even if Congress has the constitutional right to extend its regulating activities in certain of the present and proposed directions, it is not wise, or even safe, for it to insist upon going any farther than it has already gone, especially in the broad domain of the police power, once supposed to be occupied mainly or entirely by the states; (3) that the national government is becoming top-heavy because of being entrusted with too many tasks, and is not fitted to take on any more responsibilities; (4) that the state governments are more natural and effective agencies of control, because closer to the problems and persons concerned; and (5) that in seeking to enforce uniform standards through an ever-widening network of federal law, backed up by steadily expanding federal administrative machinery, Congress is strangling the states and reducing them to mere local areas charged only with “the neat and humble care of detail in obedience to a nationally determined policy.” And we hear the governor of one of the states solemnly calling upon his fellow citizens “to resist unwarranted encroachments of every kind by the federal government upon the sovereign rights of our state and the guaranteed liberties of our people.”<sup>2</sup> The policy of subsidies, as developed in later years, is, in particu-

<sup>1</sup> E. F. Trabue, “The Proposed Twentieth Amendment to the Constitution—A Vicious Step toward Centralization of Power,” *Amer. Law Rev.*, LXI, 205-216 (Mar.-Apr., 1927).

<sup>2</sup> Governor A. C. Ritchie, of Maryland, in his second inaugural, quoted in W. C. Redfield, “Federal Usurpation,” *Forum*, LXXIII, 88 (Jan., 1925). Cf. A. C. Ritchie, “Back to States’ Rights,” *World’s Work*, XLVII, 525-529 (Mar., 1924); “Shall We Govern Ourselves?,” *Scribner’s Mag.*, LXXXIII, 419-429 (Apr., 1928); J. A. Reed, “Federal Encroachment,” *Amer. Law Rev.*, LXII, 123-140 (Jan.-Feb., 1928); D. Wilhelm, “Too Many Federal Cooks,” *Forum*, LXXIII, 721-729 (May, 1925); G. M. Martin, “American Women and Paternalism,” *Atlantic Monthly*, CXXXIII, 744-753 (June, 1924).

lar, opposed on the ground (1) that by means of it the national government in effect buys the right of compelling and supervising activities over which it would otherwise have no control; (2) that the system encourages manipulation and vote-trading in Congress for special favors for particular localities or interests; (3) that, in addition to depriving the states of their just powers, it begets the habit of relying on doles and encourages the demoralizing notion that the government at Washington owes every business and profession a living; (4) that "federal aid" is a misnomer, since all that the federal government does is to take money from the people of the states, in the form of taxes, put it in the general fund, draw it out again, and give it back, in somewhat altered proportions; and (5) that the richer states are made to bear most of the burden and progressive states are penalized for the benefit of more backward ones; to be more specific, that the East carries most of the load and the West and South receive most of the advantages.

CHAP.  
XXVIII

On the other side of the larger, general question, it is contended (1) that time, inventions, and other forces have so thoroughly nationalized the United States that most fundamental social and economic interests are no longer local, but instead cut across state and sectional boundaries, and are of common concern to the entire country; (2) that along with this great change of conditions has gone a corresponding change of political thought, so that people no longer expect or desire the state or regional autonomy that prevailed in earlier and simpler days; (3) that the states have not been so efficient as to have demonstrated their right to be let alone in matters of deep human concern;<sup>1</sup> (4) that so long as social and economic conditions arise which, if they are to be regulated at all, must be regulated by the national government, it is of no avail to say that the national government is unfitted to take on more responsibilities, the proper course being, rather, to reconstruct that government so as to remedy the deficiency, if it exists; and (5) that it is futile to expect a constitutional system operating in a great, growing, changing society such as ours to go on from generation to generation unchanged, even in its fundamentals.

Counter-  
arguments

<sup>1</sup> Speaking before the Pennsylvania Society in New York in 1906, Mr. Elihu Root, then secretary of state, predicted that if the states did not show more evidence of meeting their responsibilities efficiently, sooner or later constructions of the constitution would be found which would "vest the power where it will be exercised—in the national government." C. W. Pierson, *Our Changing Constitution*, 150.



As for the policy of grants-in-aid, and the augmented national control that it entails, the criticisms that have been enumerated are met with a rebuttal running somewhat as follows: (1) the system enables minimum national standards to be set up in important fields of social and economic regulation, for the good of the people of the country as a whole; (2) it divides burdens which states are often unable to bear alone, quite justifiably requiring the richer states to help the poorer ones improve conditions in which all have a large common interest; (3) it makes for economical expenditure of federal funds, and, by imposing reciprocal obligations, checks the scramble for public money which invariably takes place when such money is given out without imposing local responsibilities, as has been the practice, for example, in making river and harbor appropriations; (4) the initiative and responsibility left to the states keep the scheme elastic and furnish all necessary safeguards against national bureaucracy; and (5) no state is obliged to subject itself to the operation of the system unless it desires to do so—a feature of the plan under which the constitutional obstacles that formerly blocked the setting up of national standards are quietly and effectively overcome.<sup>1</sup>

Difficulty  
of obtain-  
ing an  
objective  
view

One who calmly contemplates the arguments for and against grants-in-aid—for and against increased national activities generally—will be impressed by two facts: first, that most of what is said on the subject has a controversial purpose and is colored by the particular interest, prejudice, or point of view of the speaker or writer; and second, that, accordingly, the discussion is often conducted on very confused lines and with regrettable lack of balance and perspective. The capitalist who pays a large income tax may think that the government ought to reduce taxes rather than distribute their proceeds in support of state educational ac-

<sup>1</sup> A committee on federal aid to the states, appointed by the National Municipal League in 1927, presented, in 1928, an illuminating report, prepared by Professor A. F. Macdonald, and published as a supplement to the *National Municipal Review*, Vol. XVII, Suppl., 619-659 (Oct., 1928). The main conclusions arrived at were as follows: (1) federal aid has stimulated state activity in the various fields of work affected; (2) it has raised state standards; (3) it has been consistently administered without unreasonable federal interference in state affairs; (4) it has accomplished results without standardizing state activities; (5) federal administration of the subsidy laws has been uninfluenced by partisan politics; (6) federal aid has mitigated some of the most disastrous effects of state politics; and (7) it has placed no unreasonable burden on any section of the country. While unqualifiedly endorsing the principle of federal aid, the committee reports that there is wide variation in the efficiency with which the national agencies perform the work of inspection and supervision, and adds that congressional appropriations to most of the bureaus for administrative purposes are "totally inadequate."

tivities; the social reformer, who endorses federal aid for the care of mothers and infants, may have little interest in similar aid for the protection of forests; the southerner may feel like condemning the entire grant-in-aid system because it seems to him to contravene the time-honored principle of states' rights; a political party may consider it good strategy to thunder against the "centralizing" tendencies of its rival.

CHAP.  
XXVIII

Out of the welter of *ex parte* argument arise certain conclusions. The first is that the subject is not one upon which to dogmatize. The proper attitude is not a generalized opposition or a generalized support, but willingness to consider each form or phase of nationalization on its own merits. A second point is that centralization and decentralization are not mutually exclusive principles, only one of which can be followed at a given time. Large business establishments have found that efficiency requires uniformity and concentration in certain of their operations and quite the reverse in others. So it is with governments. A high degree of centralization in one field is entirely compatible with no centralization at all in other fields. In the third place, the growth of national control is inevitable, however one may feel about it. It is the universal experience, once national unity has been attained; and the device of federalism can no more prevent it in the United States than in Germany, Switzerland, or other countries that started with highly decentralized systems. Let social and economic interests develop to a point where they are no longer bounded by state lines, but are of regional or national concern, and any attempt to keep up exclusive state regulation not only is hopeless, but, if persisted in, is certain to precipitate a conflict between state power and national power. "The outcome of such a conflict can never be long in doubt. The greater will prevail over the lesser. Any constitutional peg upon which the extension of federal control necessary to meet the new situation can be hung is certain to be availed of; and the federal courts, which always seek to uphold Congress if possible, will stretch the mantle of the constitution to the limit in order to make it cover the exercise of the new authority."<sup>1</sup> Excellent illustration is afforded by the refusal of the Supreme Court to hold the Sheppard-Towner Act unconstitutional.

Some  
cardinal  
facts  
in the  
situation

What of the states? Are they, then, to be overborne by the advancing authority of the national government and reduced to the impotence predicted for them by the Anti-Federalists of a hundred

The  
outlook  
for the  
states

<sup>1</sup> W. MacDonald, *A New Constitution for a New America*, 169.

and forty years ago? Are they gradually to sink into obsolescence, while the people become welded in one great body politic and the government at Washington possesses itself of unified and ubiquitous control like that wielded by the governments at London and Paris? Some aspects of the present situation undoubtedly point in that direction. The national constitution and its amendments impose restrictions on the states; and the definition and enforcement of these restrictions fall within the province of the national, not the state, courts. The old physical separateness, even isolation, of the states is gone, never to return. National interests increasingly transcend state interests; or, if not national interests, at all events regional, or sectional, ones.<sup>1</sup> After full weight is given to these and other considerations, however, the states are left with much ground for assurance. They are entrenched impreg- nably in the constitutional system; they possess a great and unde- fined volume of powers, which can be transferred to the national government only with their own consent; they carry on more activ- ities, spend more money, have more employees, and do more for their people to-day than ever before; they are still more essential to the existence of the nation than it is to theirs. As separate political entities, they have lost importance; probably they will lose further. But as areas of active governmental administration, they have gained. And though, as seems probable, they may func- tion more and more, in their administrative work, as collaborators with, and even as agents of, the national government, this will mean only that the mode or manner of their usefulness has changed, not that they have atrophied and failed.

Some con-  
sequences  
of the ex-  
pansion of  
national  
activities

Differences of opinion on constitutional and political phases of the expansion of national activities in recent decades are inevitable. But certain results are manifest to the most casual observer. One of them is the enormously increased cost of running the national government. A "billion-dollar" Congress was a notable matter two decades ago; nowadays, appropriations in a single year more than triple that amount, and notwithstanding the aid which comes from the new budget system introduced in 1921, the task of spending the public money wisely imposes a greater burden on Congress than ever before. A second consequence is that the national government has been led to embark upon business undertakings, sometimes in active competition with private capitalists and corporations. A

<sup>1</sup> W. B. Munro, *The Invisible Government*, Chap. vi; A. N. Holcombe, *Political Parties of Today* (New York, 1924), Chap. iv.

Shipping Board, established in 1916, operates merchant ships as a public enterprise, and also leases ships to private companies which agree to maintain certain designated services. A Farm Board, set up in 1929, and functioning as "merchant, speculator, and banker," buys, stores, and sells grain, and in other ways manipulates markets in the effort to control surpluses and improve agricultural conditions. Proposals long pending in Congress look to keeping the Muscle Shoals project in public hands, under terms that might make the United States the greatest power and fertilizer producer in the world.<sup>1</sup> A third result is the multiplication of investigative, supervisory, and administrative agencies outlined in earlier chapters of this book.<sup>2</sup> Older executive departments—State, Treasury, Post-Office, Interior—have broadened out as new functions have been added and earlier ones elaborated; the newer departments—notably Agriculture and Commerce—have developed into vast, complicated administrative mechanisms; and outside of the ten departments has risen a labyrinth of commissions, boards, and special offices of one kind or another. Most of the detached agencies are clothed with an amplitude of quasi-judicial and quasi-legislative powers which Congress did not deem it advisable to entrust to a department, bureau, or even, as a rule, to an independent service under the direction of a single officer. Practically every one carries national supervision and control to new lengths in some designated sphere; hardly a Congress fails to add to the list; and the complexity of the executive and administrative system is correspondingly augmented. The movement for administrative reorganization and simplification, already described, draws its impetus largely from the existing heterogeneity of administrative arrangements, both inside and outside of the ten departments; in turn, this condition is traceable mainly to the increase of national activities in the past twenty-five years.

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<sup>1</sup> A measure of this nature passed both houses in 1931, but was vetoed by President Hoover.

<sup>2</sup> See especially Chaps. XVII-XVIII, XXVI-XXVII above.

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## CHAPTER XXIX

### TERRITORIES, DEPENDENCIES, AND PROTECTORATES

The clause which authorizes Congress to “dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States”<sup>1</sup> was placed in the constitution primarily in order to enable the new government to continue to exercise an important power which had been assumed by the national government under the Articles of Confederation. Without any express grant of authority, the old Congress had provided for the government of the region north and west of the Ohio River, commonly called the Northwest Territory, by enacting in 1787 a fundamental law known as the Northwest Ordinance—probably the most important single measure adopted by Congress during the entire period of the Confederation. The region covered by this ordinance had come into the possession of the United States as a result, not only of the victory in the Revolutionary War, but of a series of cessions made by states which originally claimed various parts of the territory, namely, Massachusetts, Connecticut, New York, and Virginia. The territory was turned over to the United States to be held and administered by the national government for the benefit of the entire country. For its government, the Northwest Ordinance was enacted in 1787, and reënacted, substantially unchanged, two years later by the first Congress under the new constitution.

Origin  
of the  
national  
domain

The Northwest Ordinance provided that in the region north and west of the Ohio River there should be a governor, a secretary, and three judges, all appointed by Congress, or, as altered in 1789, by the president and Senate. The officers were empowered to adopt, promulgate, and enforce within the Territory such civil and criminal laws of the original states as they deemed best suited to territorial conditions, subject always to the veto of Congress and the right of that body to legislate for the Territory upon its own initiative. Under this arrangement, the inhabitants were not given any voice in governing themselves; but it was intended to be only

Govern-  
ment under  
the North-  
west  
Ordinance

<sup>1</sup> Art. IV, § 3, cl. 2.

temporary. The Ordinance went on to provide that when the Territory's population should be found to include as many as five thousand free male inhabitants of voting age, a legislature should be established whose lower house should consist of members elected, for a term of two years, by the qualified voters. The upper house, called the council, was to be composed of five persons appointed by Congress (after 1789, by the president) from a list of ten persons nominated by the territorial house of representatives and selected from residents of the Territory who owned not less than five hundred acres of land. Their term was five years.

To the governor and these two houses belonged, when this second stage was reached, all the legislative power previously exercised by the five original territorial officers; and the concurrence of the two houses and the governor was necessary to the enactment of laws. Congress retained, as before, the right to veto acts of the legislature, and to legislate upon its own initiative. In that body, however, the people of the Territory were not wholly unrepresented; for the Ordinance authorized the two territorial houses in joint session to elect a delegate who should have a seat in Congress and the right to participate in debates, although without any vote. The Ordinance went even farther and included detailed provisions guaranteeing the fundamental civil and political rights of the inhabitants of the Territory, similar to the bills of rights in existing state constitutions.

Importance  
of the  
Northwest  
Ordinance

The importance of the Northwest Ordinance lies not only in the liberal provisions made for local self-government, for representation in Congress, and for the enjoyment of fundamental civil and political rights, but also in the fact that the scheme of government therein outlined became the precedent or model for practically every law afterwards enacted by Congress for the government of our continental possessions; indeed, many of the more essential provisions found in later territorial organic acts were taken over almost bodily from the earlier Ordinance.<sup>1</sup> Of equal, or even greater, importance, however, is the fact that the Ordinance made it perfectly clear that the people of the Territory were not to be kept in perpetual subjection to congressional authority, but that, on the contrary, the territorial government was simply to

<sup>1</sup> In 1790, for example, Congress authorized a government for the region south of the Ohio River, known as the Southwest Territory, which was essentially similar to that provided for in the Northwest Ordinance. In territories organized after 1836, the appointed council forming the upper branch of the legislature was replaced by a popularly elected senate.

serve as a temporary arrangement until the growth of population should warrant the Territory's admission to the Union as a state, or group of states, upon a footing of equality with the other states. In other words, the territorial status was to be regarded merely as preparation for full statehood. Accordingly, the Northwest Territory was divided in 1800 into the "Indiana Territory" and the "Territory Northwest of the River Ohio;" and two years later the greater part of the latter was admitted to the Union as the state of Ohio. Subsequently, from the territory of Indiana were set off the territories of Michigan, Illinois, and Wisconsin, each of which was later admitted to the Union. The Southwest Territory underwent a similar splitting up, followed by the admission to statehood of Kentucky, Tennessee, Alabama, and Mississippi.

All of the territorial governments just mentioned were created in a region inherited by our present national government from the government of the Confederation; and, of course, it was this western expanse that the framers of the constitution had in mind when they expressly authorized Congress to make all needful rules and regulations for the government of territories. It is not clear that the framers had any intention of authorizing the acquisition by the national government of the other regions, even those which were contiguous, in which Congress afterwards set up territorial governments. Nevertheless, repeated decisions of the Supreme Court have settled beyond all question that the right of the national government to acquire territory, although not expressly granted, may be implied from the power to admit new states into the Union, from the power to make treaties, or from the power to carry on war and make peace.<sup>1</sup> Under one or another of these implied powers, Louisiana was acquired in 1803, Florida in 1819, Texas in 1845, Oregon in 1846, California in 1848, Alaska in 1867, Hawaii, Porto Rico, and the Philippines in 1898, and the Virgin Islands in 1917.

Power to  
acquire  
territory

In the case of territory acquired by peaceful means, congressional authority to legislate for its government begins the moment the title of the United States becomes established. During time of war, the president, in his capacity as commander-in-chief, governs, through the army and navy, any territory acquired by conquest;

Power to  
govern  
territory

<sup>1</sup> As a sovereign state, the United States also has, under international law, the power to acquire territory by discovery and occupation, or by other methods recognized as proper by international usage. This is the basis of the title of the United States to the Guano Islands, acquired in 1856. See *U. S. Compiled Statutes* (1918), §§ 3916-3924; *Code of the Laws of the U. S.* (1926), p. 1644.



but after the establishment of peace, his power to govern must be based (a) upon authority granted by the constitution to see that the laws are faithfully executed; or (b) upon some act of Congress for the government of the conquered territory; or (c) in the absence of any act of this nature, upon the implied assent of Congress that the government set up under his military authority shall continue.<sup>1</sup> At different times, Congress has temporarily clothed the president with practically absolute power over a territory. But sooner or later it has established, in practically all regions acquired before the Civil War, governments similar to those created in the old Northwest and Southwest Territories; and ultimately all such territories have been admitted as states. The only departures from the rule were California and Texas, which were admitted as states without having passed through the territorial stage.

Extent of  
this power

The admission of these two states, and the organization of territorial government in those portions of the national domain not covered by the Northwest and Southwest ordinances, furnished the occasion, prior to 1860, for many exciting sectional controversies over slavery. At no time, however, was the absolute power of Congress to determine the form of territorial governments challenged; and the principle became firmly established that such governments exist merely as the instrumentalities by which Congress exercises its authority over the territories, and may therefore assume any form that Congress deems suitable: they may or may not be republican in form; they may or may not observe the principle of separation of powers; they may or may not grant to the inhabitants the rights of self-government. The real sectional conflict finally centered in the question whether the inhabitants of a territory have the same personal and property rights under the constitution that citizens enjoy in the states. More specifically, could Congress prevent the owners of slaves from enjoying their rights in that species of property in the territories, when admittedly it could not interfere with those rights in the states? Did the prohibition of slavery in the territories amount to a deprivation of property without due process of law, in violation of the Fifth Amendment? The issue thus raised was decided by the Supreme Court in the *Dred Scott* case in favor of the pro-slavery contention that the provisions of the bill of rights limit congress-

<sup>1</sup> W. W. Willoughby, *Constitutional Law of the U. S.* (2nd ed.), I, Chaps. XXIII-XXVIII.

sional action, not only when legislating for the inhabitants of the states, but also when legislating for the people of the territories. So far as slavery was concerned, the Civil War and the Thirteenth Amendment reversed this decision; but forty years or more thereafter, the Court upheld the same legal principle in deciding that the Sixth and Seventh Amendments prevent both Congress and a territorial legislature from changing the constitutional rule requiring trials by juries of twelve persons and unanimous verdicts.<sup>1</sup>

With the exception of Alaska, all territories acquired by the United States before the Spanish-American War were contiguous and had been settled and developed by natives of this country and by European immigrants whose civilization and traditions were not fundamentally different from our own. Consequently, Congress felt little or no hesitation in extending to them a large measure of self-government and of the civil rights guaranteed by the national constitution. The Spanish-American War, however, brought under the control of the United States non-contiguous territory lying in the tropics and inhabited by relatively backward peoples of different race, almost totally inexperienced in self-government, and enjoying none of the civil and political rights which have long been the cherished heritage of our own citizens. Admittedly, the power to govern these new acquisitions resided in Congress; and at first glance it seemed necessary, in view of earlier Supreme Court decisions, to extend to their inhabitants all the rights and privileges enumerated in the constitution, including freedom of speech and of the press, the right to bear arms, and trial by jury. But the embarrassing results which might follow this adherence to legislative and judicial precedents made it highly desirable to draw some distinction between the legal status of these new possessions and that of the older territories on the continent; and in a series of decisions, beginning about 1900,<sup>2</sup> the Supreme Court developed such a distinction, and thereby released Congress from some of the restrictions under which it had previously dealt with territorial problems. The distinction which the Court evolved was one as between territory "incorporated" in the United States and territory "not incorporated."<sup>3</sup> In the former category were

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New problems following the Spanish-American War

The insular decisions: "incorporated" and "unincorporated" territories

<sup>1</sup> *Springville City v. Thomas*, 166 U. S. 707 (1897); *Rasmussen v. U. S.*, 197 U. S., 516 (1905).

<sup>2</sup> J. W. Burgess, "The Decisions in the Insular Cases," *Polit. Sci. Quar.*, XVI, 486-504 (Sept., 1901).

<sup>3</sup> F. R. Coudert, "The Evolution of the Doctrine of Territorial Incorporation," *Columbia Law Rev.*, XXVI, 823-850 (Nov., 1926); *Amer. Law Rev.*, LX, 801-864 (Nov.-Dec., 1926).

included Alaska, Oklahoma, New Mexico, and Arizona, none of which, at the time of these decisions, had been admitted to statehood. In legislating for the incorporated territories, said the Court, Congress was bound by all the limitations in the constitution which were not clearly inapplicable. Hawaii, Porto Rico, and the Philippines, on the other hand, were held to be "unincorporated" territories; they belonged to the United States rather than to any foreign power; they were appurtenant to, and dependencies of, the United States, but not a part thereof in the sense in which the incorporated territories were. Congress, therefore, in legislating with respect to them was not bound by all the limitations of the constitution applicable to the incorporated territories, but only by the "fundamental" parts of the constitution. These automatically extend to all territories of the United States as soon as they cease to be foreign territory. The "formal" portions of the constitution, on the other hand, apply to unincorporated territories only when Congress expressly so directs.

The court has not attempted to make an exhaustive enumeration of the fundamental and formal parts of the constitution, but has reserved the right to determine from time to time what parts are fundamental and what parts are formal. In cases already decided, it has held that Congress is not bound by the requirement that taxes shall be uniform throughout the United States, but may impose taxes upon articles coming from the island dependencies which are different from those collected upon similar articles coming from a foreign country. Similarly, the Court has held that the requirement of grand and trial juries for the prosecution of criminals does not bind Congress in providing for the government of unincorporated territories like Hawaii (before 1900), Porto Rico, and the Philippines. Moreover, it has held that the mere act of annexation did not make the inhabitants of these islands citizens of the United States, but that American citizenship is to be derived from some express grant thereof by Congress.<sup>1</sup> The result of all these decisions has been to give Congress a fairly free hand in working out the new problems arising out of our possession of tropical dependencies inhabited by politically inexperienced peoples. In point of fact—as will appear from the following description of the governmental arrangements which Congress has provided for our newer possessions—most of the rights guaranteed by the

<sup>1</sup> Anon., "Status of Filipinos for Purposes of Immigration and Naturalization," *Harvard Law Rev.*, XLII, 809-812 (Apr., 1929).

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constitution have been generously extended to the people of such dependencies.

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Alaska and Hawaii are at present our only "incorporated," or fully organized, territories. The inhabitants of Alaska are citizens of the United States; and in the organic act of 1912<sup>1</sup> the constitution and all laws of the United States not locally inapplicable are expressly declared to be in effect there, as elsewhere in the country. The present government is based on an act of 1884 establishing the first civil government, on later amendments to this act, and especially on the organic act of 1912 which gave the region a fully organized territorial government of the traditional type. There is a governor, and a surveyor-general acting *ex-officio* as territorial secretary; and in each of four judicial divisions there is a district judge, a district attorney, and a marshal. All of these officers are appointed by the president and Senate for a four-year term, and are paid for their services out of the national treasury. In 1927, the departments of the Interior, Agriculture, and Commerce were authorized to designate one of their employees in Alaska to be *ex-officio* commissioner for Alaska and to have charge of all matters coming under the jurisdiction of his department, subject to the supervision and control of the respective heads of these departments in Washington.<sup>2</sup> The district court, now organized in four divisions, has the civil, criminal, equity, and admiralty jurisdiction of the district, and former circuit, courts of the United States.

The gov-  
ernment of  
Alaska

Executive  
and  
judiciary

In 1912, Congress authorized the establishment of a territorial legislature consisting of a senate and a house of representatives. The senate is composed of eight members, two elected from each of the four judicial divisions; the house consists of sixteen members, four elected from each judicial division. The term of senators is four years; that of members of the house, two years. The first session of this legislature was held in 1913. The length of legislative sessions is limited to sixty days in any period of two years, although special sessions, not to last more than fifteen days, are

Legislature

<sup>1</sup> U. S. Compiled Statutes (1918), pp. 545-557 (1923), pp. 206-216; Code of the Laws of the U. S. (1926), pp. 1557-1598.

<sup>2</sup> 44 U. S. Statutes at Large, Pt. 2, pp. 1068-1069. Unlike most other nations having extensive dependencies, the United States has not entrusted colonial supervision to a single executive department. Instead, the War Department, and especially the bureau of insular affairs therein, maintains general supervision over Porto Rico, the Philippines, and the Canal Zone; the minor island dependencies are under the supervision of the Navy Department; and certain phases of administration in Alaska, Hawaii, and the Virgin Islands have been assigned to the Department of the Interior.

also authorized. The power of the legislature extends to "all rightful subjects of legislation not inconsistent with the constitution and laws of the United States," although a long list of limitations upon legislative action is included in the organic act. The governor may veto legislative measures; and these are also subject to disallowance by Congress. A governor's veto can, however, be overcome by a two-thirds vote in each house. Since 1906 Alaska has been represented in Congress by an elected delegate, who, however, has no vote. The right to vote for territorial delegate and for members of the legislature has been granted to all citizens of the United States, twenty-one years of age, who are bona fide residents of Alaska, who have been resident continuously during the entire year immediately preceding an election, and who are able to read the constitution in the English language and to write English.<sup>1</sup>

The gov-  
ernment of  
Hawaii

The people of the republic of Hawaii had long been seeking inclusion in the United States when Congress, in 1898, voted by joint resolution to annex the islands. Two years later, the organic act was passed which now forms the basis of the government of the territory of Hawaii.<sup>2</sup> By this act all persons who were citizens of the Hawaiian republic on August 12, 1898, are declared to be citizens of the United States and of the territory of Hawaii; and all citizens of the United States who resided in Hawaii on that date, or who subsequently have resided in the territory for one year, are declared to be citizens of the territory. The constitution of the United States and, with a few exceptions, all United States laws not locally inapplicable have the same force and effect in the territory as elsewhere in the United States.

Citizenship

Executive

The present government of Hawaii follows very closely the traditional arrangements of organized territorial governments. Executive authority is vested in two sets of officers, one appointed by the president and Senate, and the other appointed by the governor of the territory and the Hawaiian senate. In the first class are the governor and the secretary, both of whom are appointed for a four-year term. The officers appointed and removable by

<sup>1</sup> This literacy qualification was added by the territorial legislature in 1925 and by Congress in 1927. *Session Laws of Alaska* (1925), Chap. 27, pp. 51-54; 44 *U. S. Statutes at Large*, Pt. 2, pp. 1392-1394.

<sup>2</sup> *U. S. Compiled Statutes* (1918), pp. 545-557 (1923), pp. 206-216; *Code of the Laws of the U. S.* (1926), pp. 1599-1614, 2117-2118. Between the date of annexation (1898) and the enactment of the organic law of 1900, Hawaii was an unincorporated territory. See *Hawaii v. Mankichi*, 190 U. S. 197 (1902).

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the governor and territorial senate are an attorney-general, a treasurer, a commissioner of public lands, a commissioner of agriculture and forestry, a superintendent of public works, a superintendent of public instruction, an auditor and a deputy auditor, a surveyor, and a high sheriff.<sup>1</sup> The tenure of all of these officials is four years, unless they are sooner removed by the governor and senate.

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The legislature comprises a senate and a house of representatives, both elected by direct popular vote. The senate consists of fifteen members chosen for four years from senatorial districts which are entitled to two, three, four, or six senators, respectively. Each voter, however, is permitted to vote for only one candidate. The house of representatives has thirty members, elected every two years, from six representative districts, each of which is entitled to either four or six members. Voters are permitted to vote for the full quota from their district. Legislative sessions are held biennially, and are limited to sixty days, although the governor may extend a session thirty days. The power of the legislature extends to "all rightful subjects of legislation not inconsistent with the constitution and laws of the United States locally applicable;" at the same time, there is, as in Alaska, a long series of specific limitations. The governor may veto legislative acts; but a veto may be overridden by a two-thirds vote of both houses.

Legislature

Judicial power within the territory is exercised by two sets of courts, territorial and federal. The territorial courts correspond rather closely to our state courts, and comprise a supreme court, circuit courts, and such inferior courts as the legislature may create from time to time. The supreme court consists of a chief justice and two associate justices, all of whom must be citizens of Hawaii. They, and the judges of the circuit court also, are appointed by the president and Senate for a four-year term, unless sooner removed by the president. Besides these territorial courts, there is a federal district court consisting of two judges, a district attorney, and a marshal, all of whom are appointed by the president and Senate for a six-year term, unless sooner removed by the president.<sup>2</sup>

Judiciary

A territorial delegate to Congress, without a vote, is also elected by the people every two years. To be qualified to vote for territorial

Suffrage

<sup>1</sup> Members of numerous boards and commissions are similarly appointed.

<sup>2</sup> S. U. Loo, "Administration of Justice in Hawaii," *Jour. Amer. Jud. Soc.*, XII, 111-116 (Dec., 1923).

delegate and for members of the legislature, a person must be a citizen of the United States, twenty-one years of age, a resident of the territory for at least a year prior to the election, duly registered as a voter, and able to speak, read, and write the English or the Hawaiian language. The effect of these restrictions is to exclude most of the Chinese and Japanese, who constitute almost half of the population of the islands.<sup>1</sup>

Porto Rico and the Philippine Islands are our most important unincorporated, or partially organized, territories. The government of Porto Rico is based on organic acts passed by Congress in 1900 and 1917.<sup>2</sup> The second measure extended United States citizenship for the first time to the residents of the island. Previously, they had been neither citizens of the United States nor citizens of a foreign country, but merely citizens of Porto Rico.<sup>3</sup> The act of 1917 also included an elaborate bill of rights covering almost all of the points in the first eight amendments to the national constitution, with the omission of trial by jury and indictment by grand jury.<sup>4</sup> Most statutory laws of the United States not locally inapplicable have the same force and effect in Porto Rico as in the United States proper.

The "supreme executive power" is vested in the governor, who is appointed by the president and Senate, and who holds office during the pleasure of the president. Six executive departments were created in 1917, namely, a department of justice, with the attorney-general at its head; a department of finance, with the treasurer at its head; and a department of interior, a department of education, a department of agriculture and labor, and a department of health, each with a commissioner at its head. The attorney-general and the commissioner of education are appointed by the president and Senate for four years, unless sooner removed by the president. The heads of the other departments are appointed by the governor and senate of Porto Rico, for a term of four years, unless sooner removed by the governor. These heads of departments collectively form an executive council.<sup>5</sup> The principal finan-

<sup>1</sup> In 1930, there were 18,952 Hawaiian voters, 8,964 Anglo-Saxon, 7,057 Portuguese, 4,849 Japanese, and 3,950 Chinese.

<sup>2</sup> *U. S. Compiled Statutes* (1918), pp. 557-575; *ibid.* (1923), pp. 216-217; *Code of the Laws of the U. S.* (1926), pp. 1614-1625.

<sup>3</sup> A. Shaw, "Porto Ricans as Citizens," *Rev. of Revs.*, LXIII, 483-491 (May, 1921); S. Baxter, "Porto Ricans under the Stars and Stripes," *ibid.*, LXVII, 497-506 (May, 1923).

<sup>4</sup> *Balzac v. Porto Rico*, 258 U. S. 298 (1922).

<sup>5</sup> Until 1917, the executive council, somewhat differently constituted, formed the upper branch of the territorial legislature.

cial officer is an auditor appointed by the president for a term of four years, and enjoying very extensive powers, although under the general supervision of the governor. Corresponding to the territorial secretary in Alaska and Hawaii is an executive secretary, appointed by the governor and senate of Porto Rico.

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The Porto Rican legislature also is much like the Hawaiian. The senate consists of nineteen members elected by popular vote for a four-year term; each of seven districts elects two senators, and five others are elected at large. To this body the organic law of 1917 transferred all the purely legislative powers and functions theretofore exercised by the executive council, and also the confirmation of appointments. The house of representatives consists of thirty-nine members elected every four years, thirty-five of them chosen from single-member districts and four elected at large. In electing the senators and representatives who are chosen at large, each voter is permitted to vote for only one candidate for the senate and house respectively. Legislative sessions are held biennially, and special sessions of the senate, or of both houses, may be called by the governor.

Legislature

General legislative powers were conferred on the Porto Rican legislature in 1917 in substantially the same language as in the organic laws of Alaska and Hawaii; but, in the case of Porto Rico, legislative organization and procedure are regulated in much greater detail than in either of the other territories mentioned. The possibility of a deadlock between the two houses over appropriations for the support of the government has been provided for since 1909 in much the same manner as in the organic act of 1900 for Hawaii. If, by the end of the fiscal year, the territorial legislature has failed to make the necessary appropriations for the ensuing fiscal period, the sums specified in the last appropriation bills are deemed to have been reappropriated. The provision relating to the veto power of the governor is unusual, in that it permits an appeal to the president. A bill vetoed by the governor may be repassed by a two-thirds vote of each house; and in case the governor still refuses to approve the measure, it is transmitted to the president, who is given ninety days in which to signify his approval or disapproval; inaction on his part is tantamount to approval. All laws passed by the legislature of Porto Rico have to be submitted to the president, and are subject to annulment by Congress.

Public  
service  
commis-  
sion

Budget

Veto

A resident commissioner, corresponding to the territorial delegates from Alaska and Hawaii, is elected by popular vote every



four years to represent the Porto Ricans in Congress, without a vote. Voting qualifications are, for the most part, left by the organic acts to be prescribed by the local legislature, subject to the provision that "no property qualification shall ever be imposed upon or required of any voter." Since 1906, citizens of Porto Rico who have resided in the island one year, and are twenty-one years of age, have been voters, provided they could prove their ability to read and write. Beginning in 1932, women will be permitted to vote provided they are able to pass the literacy test.

As in Hawaii, there are two kinds of courts, territorial and federal. At the head of the former stands the supreme court, composed of five justices appointed by the president and Senate for life or good behavior. Below this court are seven district courts, each presided over by one judge appointed by the governor and senate for a term of four years. Provision is made also for a substitute judge to serve whenever any regular judge is incapacitated. Finally, there are thirty-four "municipal" courts, in as many judicial districts, with limited jurisdiction in civil and criminal cases. In each of these municipal courts there is a single judge who, together with a marshal and a clerk, is elected by popular vote every two years. There are also fifty-one justices of the peace, appointed by the governor and senate. Besides these territorial courts, there is a federal district court with one judge, a district attorney, and marshal, all of whom are appointed by the president and Senate for four years, unless sooner removed.<sup>1</sup>

For nearly three years after the Philippine Islands were ceded by Spain to the United States, they were governed under the direction of the president. Despite the military character of this régime, preparations steadily went on from the beginning of American rule for the establishment of a stable civil government. The first step in this direction came with the president's appointment, in 1900, of the Second Philippine Commission<sup>2</sup> and the transfer to it of

<sup>1</sup> Many Porto Ricans contend that the present status of the island is unsatisfactory and that a greater measure of self-government should be granted to its people. Some demand full statehood; others, that Porto Rico be erected into a "free state" under the protection of the United States. Cf. *Curr. Hist.*, XXVIII, 263-276 (May, 1928), series of articles on "Porto Rico as a Part of the United States;" V. S. Clark, *Porto Rico and Its Problems* (Washington, 1930); J. E. Cuesta, *Porto Rico, Past and Present; the Island After Thirty Years of American Rule* (New York, 1929); H. L. Cox, "The Government of Porto Rico," *Nat. Univ. Law Rev.*, X, 36-64 (Jan., 1930).

<sup>2</sup> The first Philippine Commission, appointed in 1899, was only an investigative, not a governing, body. The chairman was Jacob Gould Schurman, then president of Cornell University.

legislative functions previously performed by the military authorities. In 1901, Congress authorized the president to establish a temporary civil government in the islands. William H. Taft was made civil governor; the Philippine Commission was enlarged to include four Americans and three Filipinos; and to this new commission were transferred all the executive powers hitherto exercised by the military authorities in the pacified provinces.<sup>1</sup> In July, 1902, Congress enacted the first organic law for the islands, a measure which, with only slight changes, continued the government by commission then in force.<sup>2</sup> At the same time, provision was made for a legislative assembly to be chosen by popular vote; but it was not until 1907 that the first Philippine assembly convened and assumed its functions as the lower branch of a legislature whose upper branch consisted of the commission. Thus constituted, the legislature continued to enact laws of local application, subject to the veto of the governor and the disapproval of Congress, until the passage of the Philippine government act of 1916, under which the present government of the islands is organized and conducted.<sup>3</sup>

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The act of 1916, commonly known as the Jones act, made three important changes: first, it materially enlarged the insular government's powers; second, it strengthened the hands of the executive branch; third, it replaced the commission as a legislative body with a senate elected by the people. The "supreme executive" power is vested in the governor-general, appointed by the president and Senate, and holding office during the pleasure of the president. He has large powers of appointment, subject to the approval of the Philippine senate, and likewise general supervisory control over all departments and bureaus. He also submits the budget, which is the basis of the annual appropriation bills; and, unlike the governor of Porto Rico, he has exclusive power to grant pardons and reprieves, and to remit fines and forfeitures. In general, he has rather broader powers than have been granted to the governors of our other dependencies. There is also a vice-governor, appointed in the same manner, who, in addition to serving in the governor-general's absence or incapacity, acts as head of the department of

Organic  
law of  
1916

Executive

<sup>1</sup> The complete pacification of the islands dates from July 4, 1902, when the office of military governor in the hitherto rebellious provinces was abolished and these provinces were placed under the jurisdiction of the governor and commission.

<sup>2</sup> When the commission form of government was superseded in 1917, there were nine members of the commission, of whom five were Filipinos.

<sup>3</sup> *U. S. Compiled Statutes* (1918), pp. 575-593; *ibid.* (1923), p. 217; *Code of the Laws of the U. S.* (1926), pp. 1625-1637.

public instruction, which includes a bureau of public health as well as a bureau of education. The supervising and controlling financial officers are an auditor and a deputy auditor, appointed by the president, with powers similar to those of the auditor of Porto Rico. At the present time (1931), there are six executive departments, namely, interior, public instruction, finance, justice, agriculture and natural resources, commerce and communication; and each, with the exception of the department of public instruction, is presided over by a Filipino secretary, appointed by the governor-general and Philippine senate. The heads of these several departments form the governor-general's cabinet; and recently (1928) they have been granted the privilege of the floor in both branches of the legislature, with the right to speak on subjects relating to their departments and the duty of submitting to interrogations thereon.

## Legislature

General law-making powers are vested in a legislature consisting of two houses, elected by popular vote, save that two senators and nine representatives are appointed by the governor-general to represent the non-Christian districts. Of the twenty-four senators, twenty-two are elected in eleven districts, each district choosing two for a six-year term; and one-half of the total number are elected every three years. Of the ninety representatives, eighty-one are chosen from single-member districts for a three-year term. The organization and procedure of the legislature are fully covered in the organic law; and provision is made, as in Hawaii and Porto Rico, that if the two houses fall into a deadlock on the budget, the appropriations previously made shall be regarded as continuing in force. The governor-general's veto on legislation, with subsequent appeal to the president, is the same as in Porto Rico, except that the president has six months, instead of three, in which to signify his approval or disapproval.<sup>1</sup> All acts of the legislature have to be transmitted to Congress, and that body has a right (seldom exercised) to annul any of them.

The council  
of state

As a connecting link between the executive and legislative branches, though quite unprovided for in the Jones Act, a council of state was created in 1918 by Governor-General Harrison, consisting of the governor-general, the heads of the six departments,

<sup>1</sup> The first measure to receive a presidential veto was a bill providing for a popular referendum on the question of Philippine independence (April 6, 1927). The veto message of President Coolidge sets forth at length the reasons which justify the denial of immediate independence. See *N. Y. Times*, April 7, 1927; *U. S. Daily*, Apr. 8, 1927, p. 380.

and—of especial significance—the speaker of the house and the president of the senate. This body was abolished by Governor-General Wood, but revived by Governor-General Stimson, who added to its membership the majority floor leaders of the two branches of the legislature. At the present time (1931), the council of state is purely a consultative body to advise the governor-general in the preparation of the annual budget and upon such other matters of public policy as he may from time to time lay before it.<sup>1</sup> The inclusion of the presiding officers and floor leaders in the legislature brings to the council table, openly and officially, the four most influential native members of the government. This arrangement may fairly be looked upon as an attempt to establish a responsible cabinet system of government—a step regarded by former Governor-General Stimson as highly desirable in the working out of Filipino autonomy.

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Two resident commissioners are elected by the legislature every three years to represent the islands in Congress. They are entitled to speak, but not to vote. The suffrage for the choice of all other elective officers has been extended to male persons (except the insane, the feeble-minded, and criminals) twenty-one years of age, who are not citizens or subjects of any foreign country, and who have resided in the Philippines for a year, provided they belong to one of the following classes: (1) persons who, under existing laws, were legal voters in 1916 and had exercised the right of suffrage; (2) persons who own real property valued at five hundred pesos, or who pay the established taxes amounting to fifty pesos annually; and (3) persons who are able to read and write Spanish, English, or a native language.

Resident  
commis-  
sioners

Suffrage

The judicial system differs from that in Hawaii and Porto Rico in at least one important respect: no provision has been made for any federal court. Cases which would ordinarily come before a federal district court are placed in the jurisdiction of the Philippine

Judiciary

<sup>1</sup> Under Governor-General Harrison, the council of state soon became more than an advisory body and reduced the executive to a position of subordination to the legislature. Much of the friction which marked the administration of Governor-General Wood arose from these circumstances. See R. Hayden, "The United States and the Philippines; a Survey of Some Political Aspects of Twenty-five Years of American Sovereignty," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXII, 26-48 (Nov., 1925), and "The Philippines; an Experiment in Democracy," *Atlantic Mo.*, CXXXVII, 403-417 (Mar., 1926); "President Coolidge's Statement on Filipino Independence," *Curr. Hist.*, XX, 158-160 (Apr., 1924), reprinted in J. K. Pollock, Jr., *Readings in American Government*, 309-11; W. Wilgus, "Cleaning up the Philippines; Leonard Wood and His Six Years' Work," *Rev. of Revs.*, LXXVI, 147-153 (Aug., 1927).

courts of first instance. At the head of the judicial system is a supreme court, consisting of a chief justice and eight associate justices, appointed by the president and Senate to serve during good behavior.<sup>1</sup> The chief justice and three of the associate justices are Filipinos; the other five justices are Americans. Below the supreme court are the courts of first instance, consisting of one judge in each of twenty-six judicial districts (except in that of Manila, in which there are four judges), all appointed by the governor-general and Philippine senate. These judges (all of whom, with but two exceptions, are Filipinos) serve during good behavior, or until they reach the age of sixty-five, when they are retired. The courts in which they sit correspond to the district, circuit, or county courts of the states, with jurisdiction enlarged to include admiralty, customs, patent, and bankruptcy cases, which in the United States proper are ordinarily handled by the federal district courts. Below these higher courts, there is a justice of the peace in every municipality and a magistrate in every organized town, all of whom are Filipinos. So completely has the United States given over the government of the islands to the Filipinos that the supreme court is to-day (1931) the only branch of the insular government in which Americans form a majority; the latter constitute less than three per cent of the total number of government officials, including school teachers, while in the central government itself they comprise less than two per cent.<sup>2</sup>

The ques-  
tion of in-  
dependence

Although the Jones Act did not grant complete self-government, its preamble declared the intention of the United States to withdraw sovereignty from the Philippines and to recognize the independence of the islands "as soon as a stable government can be established therein." This measure was the work of a Democratic Congress, and the party's national platform of the same year endorsed the principle of "ultimate independence."<sup>3</sup> The Republican platform denounced the Democratic attitude, and declared that the

<sup>1</sup> From the Philippine supreme court, cases may be appealed directly to the United States Supreme Court.

<sup>2</sup> For purposes of local government, there are thirty-nine provinces, each with an elective governor; and four provinces with governors appointed by the bureau of non-Christian tribes.

<sup>3</sup> The cause of independence is ably argued in M. M. Kalaw, *The Case for the Filipinos* (New York, 1916), and *Self-Government in the Philippines* (New York, 1919); and M. L. Quezon, "The Case for Immediate Philippine Independence," *Curr. Hist.*, XX, 936-942 (Sept., 1924). A similar argument, by a former American governor-general, is F. B. Harrison, *The Corner-Stone of Philippine Independence; a Narrative of Seven Years* (New York, 1922). Compare with President Coolidge's message vetoing the Philippine plebiscite on independence, *N. Y. Times*, Apr. 7, 1927; *U. S. Daily*, Apr. 8, 1920, p. 380.

American task in the islands was but half done. The position of the parties in subsequent presidential campaigns has differed similarly, and the question continues to call out widely varying expressions of opinion.

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With a view to obtaining a fresh view of the actual situation in the islands,<sup>1</sup> President Coolidge, in the summer of 1926, sent Colonel Carmi A. Thompson, of Ohio, to the Philippines, charged with making an exhaustive investigation of general conditions there, both political and economic. Colonel Thompson's report (submitted in the following December), although opposing any action that would close the door to *ultimate* independence, declared the granting of independence to the islands, now or for some time to come, unwise, and indeed impossible. Three or four main reasons were assigned: (1) The people of the islands lack the financial resources necessary to maintain an independent government. (2) They do not have the homogeneity and solidarity essential to separate national existence, owing in part to the lack of a common language, in part to the wide gulf existing between the upper and lower classes—a gulf such as is unknown in America, and so wide as to make genuine popular government impossible at present—and, in part, to the bitter religious and other differences between the Mohammedan Moros and some of the pagan tribes, on the one hand, and the Christian Filipinos, on the other. (3) Granting independence at this time, the report goes on to say, would also be unwise from the standpoint of American commercial interests in the Orient, and might seriously complicate our international relations in that quarter. (4) Lastly, the granting of independence would end the free-trade relationship between the United States and the Philippines and bring about economic disaster for the islands.<sup>2</sup>

The  
Thompson  
report  
(1926)

<sup>1</sup> The report of a commission appointed by President Harding in 1921, consisting of General Leonard Wood and former Governor-General W. C. Forbes, is printed in *Curr. Hist.*, XV, 678-694 (Jan., 1922).

<sup>2</sup> The Thompson report may be found in 69th Cong., 2nd sess., Sen. Doc. No. 180 (1926); more conveniently, in *Curr. Hist.*, XXV, 722-726 (Feb., 1927). See also Col. Thompson's article, "Cocoanut Politics in the Philippines," *World's Work*, LIV, 27-35 (May, 1927); H. L. Stimson, "First-Hand Impressions of the Philippine Problem," *Saturday Eve. Post*, CXIX, 6-7 (Mar. 19, 1927), and "Future Philippine Policy Under the Jones Act," *Foreign Affairs*, V, 459-471 (Apr., 1927). The author of these two articles served as governor-general from December, 1927, to March, 1929.

Other recommended articles on the Philippine problem are: *Congressional Digest*, III, 226-239 (Apr., 1924), series of articles on Philippine independence; N. Lyons, "Filipino Leaders Split on Independence Issue," *Curr. Hist.*, XXI, 866-872 (Mar., 1925), and "What Next in the Philippines?," *No. Amer. Rev.*, CCXXIV, 365-373 (Sept., 1927); D. R. Williams, "The Philippine

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XXIXRecent  
congress-  
sional  
interest in  
Philippine  
independ-  
ence

Following the submission of the Thompson report, popular and congressional interest in the question of Philippine independence slumbered until roused by the tariff hearings before Congress in 1929-30. For more than two decades, Philippine sugar, tobacco, and vegetable oils have been admitted into the United States free of duty. American producers of these commodities now claimed that their free admission was injuring American industries, and demanded the repeal of the duty-free provisions of the tariff law. They went even farther and advocated an early grant of independence to the islands, in order that the tariff rates applicable to commodities from foreign countries might be brought into play to exclude the competition of island products. This plea for independence was vigorously seconded by organized labor, whose attitude is due entirely to hostility to Filipino immigration into this country. As a result, several bills providing for early independence appeared in the Seventy-first Congress. One of these, the Hawes-Cutting bill, was favorably reported by the Senate committee on territories and insular possessions (June, 1930). It provided for the complete independence of the Philippines after a five-year period of political and commercial readjustment, after which the Filipinos should draft their own constitution and set up their own independent government.<sup>1</sup> Although American sentiment favorable to early independence appeared to be stronger than at any time during the past thirty years, Congress failed to act upon any of these bills, and retained in the tariff law of 1930 the duty-free provisions mentioned above.

Change  
in Filipino  
attitude

Formerly, agitation for Philippine independence had originated among the Filipinos. This sudden appearance of unprecedented congressional interest in the matter took the Filipino leaders by surprise, and compelled them to give, for the first time, due consideration to the unpleasant and inescapable economic, political, and social consequences that might befall the islands if, Islands," *Rev. of Revs.*, LXXIV, 177-183 (Aug., 1926); S. P. Duggan, "The Future of the Philippines," *Foreign Affairs*, V, 114-131 (Oct., 1926); *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXXI, Supp., 1-33 (May, 1927), "Are the Filipinos Ready for Independence?" (a symposium); H. C. Lodge, "Our Failure in the Philippines: Shall We Govern or Get Out?," *Harper's Mag.*, CLX, 209-218 (Jan., 1930); H. T. Allen, "The Philippines; America's Duty to Retain Control," *Curr. Hist.*, XXXII, 277-283 (May, 1930); M. Roxas, "A Plea for Independence," *ibid.*, 283-285; Senator Vanderberg's plan of "Philippine Self-Rule," *U. S. Daily*, Feb. 1, 1930, p. 3341 ff.; *Transactions Common. Club of Cal.*, XXV, 351-407 (Jan., 1931).

<sup>1</sup> The majority report, favoring independence, will be found in *U. S. Daily*, June 3, 1930, p. 1057; and the minority report, opposing independence, in *ibid.*, June 5, 1930, p. 1087.

in their present condition, the "immediate, absolute, and complete" independence which they have been demanding should be granted. Sobered by reflections upon these probable results, they appear to have receded somewhat from their extreme demands, and to be taking the more conservative view that complete autonomy should await fuller economic development of the islands.

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The government of the remaining possessions of the United States must be described very briefly. The Virgin Islands, acquired by purchase from Denmark in 1917, are under the immediate control of the president, in accordance with authority conferred by Congress. The act of March 3, 1917, provided for the temporary government of the islands by placing all civil, military, and judicial powers necessary to their government in the hands of a governor, appointed by the president and Senate, aided by such other persons as the president may appoint, and wielding authority in such manner as he may direct until further action by Congress.<sup>1</sup> So far as is practicable, the electoral and other local laws enacted under Danish rule remain in force. American citizenship was conferred upon the inhabitants by act of Congress in 1927.<sup>2</sup>

Government of  
minor  
dependencies:

1. Virgin  
Islands

The Panama Canal Zone comprises a strip of territory five miles wide on each side of the canal, acquired from the republic of Panama in 1902. During the construction of the waterway, the Zone was governed by the president, acting through a commission whose appointment had been authorized by Congress. When the work of construction neared completion, Congress, in 1913, authorized the president to discontinue the commission and to govern the Canal Zone through a governor and such other officials as might be necessary.<sup>3</sup> There is now a "governor of the Canal," appointed by the president and Senate for four years. Provision has been made by law for the establishment of organized towns in the Zone, and for a system of courts beginning with the magistrates' courts corresponding to justices of the peace elsewhere. Above these, there is one district court sitting in two divisions, which has original

2. Panama  
Canal Zone

<sup>1</sup> *Code of the Laws of the U. S.* (1926), pp. 1643-1644.

<sup>2</sup> 44 *U. S. Statutes at Large*, Pt. 2, pp. 1234-1235; "A Forward Step," *Nation*, CXXIV, 334 (Mar. 30, 1927). In 1931, the islands received their first civilian governor; and at the same time, supervision of their affairs was transferred from the Navy Department to the Department of the Interior.

<sup>3</sup> *U. S. Compiled Statutes* (1918), pp. 1651-1657; *Code of the Laws of the U. S.* (1926), pp. 1637-1643; G. W. Goethals, *Government of the Canal Zone* (Princeton, 1915); D. H. Smith, *The Panama Canal; its History, Activities, and Organization* (Baltimore, 1927).



jurisdiction in all felony, and in more important civil, cases, and in equity; it also has the admiralty jurisdiction of a federal district court. The judge of this court, a district attorney, and a marshal, are appointed by the president for terms of four years each.

In our smallest insular possessions, the Midway, Howland, Baker's, and Guano islands, neither civil nor military government has yet been provided. Guam, in the Ladrone Islands, was ceded to the United States by Spain in 1898. Its status has never been fixed by Congress, and the president has governed the island through an officer of the navy, assisted by American and native officials.<sup>1</sup> American Samoa became a protectorate of the United States by virtue of the Anglo-German-American agreement of 1899. In 1900 and 1904, it was ceded to the United States by native chieftains, but the cession never received congressional acceptance and ratification until 1929.<sup>2</sup> During that twenty-five year period, Congress failed to make any provision for the government of the islands, leaving the president to govern through an officer of the navy, who has ruled under laws based on the customs of the people, the laws of the United States, and the common law of England.<sup>3</sup> The inhabitants of Samoa, like those of Guam, are not citizens of the United States. A congressional commission which visited the Samoan Islands in the summer of 1930 and investigated conditions there has unanimously recommended that Congress extend American citizenship to the inhabitants of Samoa, grant them a bill of rights similar to the one given Porto Rico in 1917, and authorize the establishment of a representative legislature, the appointment of a governor with a veto power, and the creation of courts of justice with the privilege of appeal to the federal courts of Hawaii.<sup>4</sup>

Several small Caribbean and Central American states have come so largely under the influence of the United States within the past decade or two that they can no longer be regarded as fully sovereign, but rather must be considered protectorates. At one time or another since the close of the Spanish-American War, armed

<sup>1</sup> See A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, II, 102.

<sup>2</sup> 45 *U. S. Stat. at Large*, Pt. 1, Chap. 281; *U. S. Daily*, Mar. 16, 1929, p. 115.

<sup>3</sup> See L. A. Thurston, "Our Despotism in Samoa," *N. Y. Times*, Mar. 28, 1926.

<sup>4</sup> *U. S. Daily*, Oct. 25, 1930, p. 2602. Cf. E. N. Caldwell, "American Samoa's Demand for Civil Government," *Curr. Hist.*, XXXII, 1165-1169 (Sept., 1930).

intervention by American forces has taken place in Cuba, Haiti, Santo Domingo, Nicaragua,<sup>1</sup> and Honduras, sometimes for the purpose of assuming control of a disordered financial administration, in the interest of foreign bond-holders; at other times, for the protection of life and property generally and the orderly conduct of elections, when a local insurrection was in progress or threatened. The right of the United States thus to intervene in the domestic affairs of these Lilliputian states has been derived in some instances, as in Cuba, Haiti, and Santo Domingo, from formal treaty stipulations. At other times—although perhaps broadly justifiable under the Monroe Doctrine, and also because of connection with our general foreign policy—it has rested upon far less substantial foundations. As a rule, these interventions have been for only brief intervals, our armed forces being withdrawn as soon as order could be restored and a stable government set up—stable, at least, until the next revolution broke out! But we once kept the entire administration of Cuba in our hands for two and a half years (1906-09).<sup>2</sup> Naturally, the natives have not universally welcomed such incursions. Considerable elements have protested vigorously, often carrying their grievances to Washington; and at times, notably in the case of Haiti and Santo Domingo, they have been able to induce Congress to undertake an extended investigation of the circum-

<sup>1</sup> Sharply differing views on American intervention in Nicaragua appear in the multitude of articles printed since 1926. These may be found by consulting *Readers' Guide to Periodical Literature*. The following references are especially recommended: C. W. Hackett, "Rival Governments in Nicaragua," *Curr. Hist.*, XXV, 734-736 (Feb., 1927); "The United States Intervention in Nicaragua," *ibid.*, XXVI, 104-107 (Apr., 1927); "Nicaraguan Civil Strife Ended by United States Ultimatum," *ibid.*, XXVI, 634-638 (July, 1927); "A Review of Our Policy in Nicaragua," *ibid.*, XXIX, 285-288 (Nov., 1928); *Congressional Digest*, VI, 111-137 (Apr., 1927), "The United States and Nicaragua" (series of articles); *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXXII, 115-163 (July, 1927), "The United States and Central America," (series of articles); *Curr. Hist.*, XXVI, 833-824 (Sept., 1927), series of articles on "United States Policy Toward Latin America"; H. L. Stimson, *American Policy in Nicaragua* (N. Y., 1927), and "American Policy in Nicaragua," *Sat. Eve. Post*, CC, 8-9 (Oct. 1, 1927), 20-21 (Oct. 8, 1927), 18-19 (Oct. 15, 1927); I. J. Cox, "Nicaragua and the United States, 1909-1927," *World Peace Foundation Pamphlets*, X, No. 7 (1927); Department of State, *A Brief History of the Relations between the United States and Nicaragua, 1909-1928*; H. W. Dodds, "American Supervision of the Nicaraguan Election," *Foreign Affairs*, VII, 488-496 (Apr., 1929).

<sup>2</sup> See R. R. Altunaga, "Cuba's Case for the Repeal of the Platt Amendment," *Curr. Hist.*, XXVI, 925-927 (Sept., 1927); C. E. Chapman, *A History of the Cuban Republic* (New York, 1927); G. Ireland, "Amendment vs. Revolution; Changing Cuba's Constitution," *Amer. Bar. Assoc. Jour.*, XIII, 617-621 (Nov., 1927); O. "Cuba and the United States," *Foreign Affairs*, VI, 231-244 (Jan., 1928); W. E. Walling and O. Ferrara, "President Machado's Administration of Cuba," *Curr. Hist.*, XXXII, 257-266 (May, 1930).

stances surrounding the despatching of military and naval forces and the conduct of these forces during their stay.<sup>1</sup>

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<sup>1</sup> See, for example, 67th Cong., 1st and 2nd Sess., *Hearings Before a Select Committee on Haiti and Santo Domingo*, 3 vols. (Washington, 1922); *Curr. Hist.*, XVI, 836-841 (Aug., 1922), "American Marines in Haiti Exonerated" (report of Senate select committee).

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PART IV  
STATE GOVERNMENT

CHAPTER XXX

STATE CONSTITUTIONS

The states  
as funda-  
mental  
units in  
the Ameri-  
can gov-  
ernmental  
system

The power, importance, and prestige of our national government must not be allowed to obscure the fact that practically every citizen of the United States is at the same time a citizen of some state and an inhabitant of a subdivision of a state called a county, and of some fraction of a county called variously a town or township, village, borough, or city. Indeed, no one can understand our federal system of government who is not fully acquainted with the intimate relations existing between the states and the national government; for "the state is the pivot around which the whole American political system revolves." One must always remember that what we call our national government originally resulted from a union of *states*, and that to-day it rests as truly as ever upon a union of states; hence the significance and appropriateness of the name, the *United States of America*.<sup>1</sup>

Furthermore, the states are the units upon which national political parties are organized; the states largely determine who may vote for representatives and senators in Congress, and for presidential electors; the states mark out the congressional districts from which representatives are sent to Congress, and also prescribe by law the regulations governing the nomination and election of senators, representatives, and presidential electors. Whenever it becomes necessary for the House of Representatives to choose a president, the representatives vote by states, each state having a single vote. All proposed amendments to the national constitution require ratification by state action before they become effective. Finally, at one time or another the states have been employed as the agents of the national government for a great variety of purposes. For example, they have long performed an

<sup>1</sup> Cf. *The Federalist*, Nos. XLV-XLVI.

important function in recruiting our system of national defense, at least that part of it called the militia or national guard. More recently, as has been pointed out,<sup>1</sup> they have come to play conspicuous rôles as agents of the national government in the expenditure of federal appropriations in aid of various activities, notably road-building, forest protection, vocational education, industrial rehabilitation, and especially agricultural education.

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In spite of the fact that the states are thus absolutely essential to the successful operation of our national government, surprisingly few citizens know as much about state and local government and politics as about the national government and national politics; and so very few people really know anything about county government that the county has been aptly termed "the dark continent of American politics."<sup>2</sup> This is the more curious since our points of daily contact with these nearer and less well-known governments are considerably more numerous than our points of contact with the national government; for there is scarcely a period or an activity in the life of the average person dwelling in the United States which is not in some measure, either directly or indirectly, touched, influenced, regulated, or controlled by state laws, or by local ordinances which derive their authority from state laws. It would seem, therefore, that considerations of enlightened self-interest, if no others, ought to stimulate men and women to become familiar with the organization and workings of their state, county, and local governments, and to take an active part in the selection of the public officials who are charged with the carrying on of these governments. We feel the effects of corrupt or inefficient state and local government far more keenly than we feel the results of inefficiency and corruption in the national government.

Self-interest should lead to a close study of state and local government

Before entering upon a detailed study, however, of our state and local governments, the fact should be brought out that, although the forty-eight state governments differ greatly from one another in details, they are organized, in general, on substantially the same lines, and hence correspond rather closely in their most conspicuous and important features. This will appear from a summary of the principal aspects which they have in common.

Features common to all of the states:

The United States is a union of states which are on a footing of legal equality one with another; and, so far as their representation

1. Legal equality

<sup>1</sup> See Chap. xxviii above.

<sup>2</sup> H. S. Gilbertson, *The County; the Dark Continent of American Politics* (New York, 1916).

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in the Senate is concerned, they are on a footing of political equality as well. In other words, no rights or privileges are enjoyed by one state or group of states which do not at the same time belong to all other states in the Union. This equality of the states is a fundamental principle of our constitutional system.<sup>1</sup>

2. Native  
or inherent  
powers

Although somewhat circumscribed by the express and implied limitations contained in the national constitution, the sphere of state activity is still more extensive than that of the national government, and in that sphere each state is supreme; its powers are native and inherent, not derived or delegated as are the powers of the national government.

3. A writ-  
ten consti-  
tution

Every state has a written constitution which determines the organs of state and local government, defines their respective powers and functions, and guarantees the fundamental civil rights of its citizens. This constitution is the fundamental organic law to which all state legislation and local ordinances or regulations must conform. A state is at liberty to put almost anything it sees fit into its constitution; though any provisions which conflict with the national constitution, or with acts of Congress or treaties of the United States, will be held by the courts, after proper legal proceedings, to be null and void.

4. A single  
chief  
executive

Every state has a single chief executive called the governor, who in all states except one is elected by direct popular vote; in Mississippi, he is chosen by popular vote supplemented by action of the legislature. The state governorship has descended directly from the office of governor in the colonial period.

5. A repre-  
sentative  
legisla-  
ture

Every state has a representative law-making body made up of persons chosen by direct vote of the electorate. This legislative body is usually called the general assembly. In New Hampshire and Massachusetts, however, it is known as the "general court," a name inherited from the time when the meeting of the general membership of the Massachusetts Bay Company, called the general court, was the only law-making body in the colony.

6. A bi-  
cameral  
legisla-  
ture

The legislature in every state is a two-chambered, or bicameral, body, consisting of what are generally called a house of representatives and a senate. In the case of the original thirteen states, the bicameral legislature developed naturally out of circumstances which were peculiar to the colonial period. The assembly, or popu-

<sup>1</sup> It involves no impairment of this legal equality for Congress to impose conditions with which the people of a territory must comply before their admission into the Union as a state. See pp. 122-123 above; C. K. Burdick, *The Law of the American Constitution*, 307-312.

lar branch of the colonial legislature, became the prototype of our present house of representatives; the governor and council, acting in a legislative capacity, became the prototype of the modern state senate. Without giving much, if any, real consideration of the relative merits of single-chambered and double-chambered legislative bodies, practically all of the states which have come into existence since the Revolution have from the outset employed the bicameral plan. The utility of the bicameral legislature as an instrument of democratic government, however, is now being vigorously challenged; and the question will be discussed in some detail in a later chapter.<sup>1</sup>

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In every state there is an elaborate system of courts for the administration of justice in civil and criminal cases, and for administering the estates of deceased persons. Everywhere the highest of these state courts, usually called the supreme court, exercises the right to declare null and void any act passed by the legislature of the state, or any ordinance passed by a city council, which contravenes a provision of the state constitution, the national constitution, an act of Congress, or a treaty of the United States.

7. Civil  
and  
criminal  
courts

Like the national government, all of our state governments are organized upon the theory that the powers of government fall into three great classes, executive, legislative and judicial; that each of these groups of powers should be assigned to, and exercised by, a single branch or department of the government; and that no department of government should exercise powers which have been assigned to either of the other departments. The idea is, in other words, that executive, legislative, and judicial functions should, in general, be grouped in mutually exclusive compartments.

8. Sepa-  
ration of  
powers

Hence it is that we find all of our state constitutions specifically recognizing the doctrine of separation of powers. The Illinois constitution of 1870, for example, declares that "the powers of the government of this state are divided into three distinct departments—the legislative, executive, and judicial; and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."<sup>2</sup> As might be inferred from the final clause of this article, it has not been found practicable in any of the states to make a strict application of the doctrine; by constitutional provision and by judicial construc-

<sup>1</sup> See Chap. XXXI below.

<sup>2</sup> Art. III.



tion, numerous specific exceptions to it have been made from time to time.

Unlike most of the other governmental features common to the several states, deliberate observance of the separation of powers first appeared in our political system in the period of the Revolution; and from the end of the eighteenth century to the opening years of the twentieth, the principle was almost universally acclaimed as the cornerstone of American democracy, as the chief reason for the success of our national government, and as an absolutely indispensable feature of all our state governments and of all our municipal governments as well. At the present time, however, both political scientists and men of long experience in the practical affairs of state and city administration are vigorously challenging the doctrine as a mere shibboleth;<sup>1</sup> and its abandonment in upward of a thousand cities since 1900 attests the widespread belief to-day that separation of powers, while making for a certain negative kind of safety, is nevertheless unsound. The main reason why it is unsound, according to people who feel this way, is that it assumes that there are three primary or fundamental functions of government, whereas in fact there are only two, namely, the formulation of public policy by the legislative body and the execution of that policy by the executive and judicial branches. The theory is criticized, furthermore, for its failure to give due consideration to the natural and inevitable interdependence of departments of government and the necessity that they work in close coöperation; and it has frequently been pointed out that "everywhere else in the world the principle upon which constitutional government is founded is the connection of the powers, and not the separation of the powers, of the government."

9. Checks  
and bal-  
ances

Intimately connected with the principle of separation of powers is the system of checks and balances, which is also found in every state government. Each of the three branches is provided with certain means of defense against encroachments upon its proper sphere by either of the other two branches. Thus the executive department may check legislative encroachment through the exercise of the veto power by the governor; the judiciary has a check upon the legislature through its power to declare the acts of that body unconstitutional; and in turn the legislature, through its

<sup>1</sup>H. J. Ford, "The Cause of Political Corruption," *Scribner's Mag.*, XLIX, 54-61 (Jan., 1911); W. F. Dodd, *State Government* (2nd ed., 1928), Chap. III; J. M. Mathews, *American State Government*, 34-39.

power to impeach and remove both administrative and judicial officers, and in some instances abolish courts, has a check upon the executive and judicial departments. The right of the senate to confirm many of the governor's appointments is a further check upon the executive; and the latter has a certain check upon the courts through his power of pardon and reprieve. In addition, each branch of the legislature is balanced against the other, each having a veto upon the legislative acts of the other.

Lastly, every state is divided into local government areas called counties, except in Louisiana, where the name parish is used instead. These counties or parishes, in turn, contain towns or townships, villages, boroughs, cities, and a great variety of special districts. Thus it comes about that the vast majority of people live under at least four different governments, namely, the national government, a state government, a county government, and the government of one or more subdivisions of a county, such as a city, township, village, or borough; and it is with one or another of these varied subdivisions of a county that the native-born citizen, consciously or unconsciously, first comes into contact.<sup>1</sup>

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10. Subdivisions for purposes of local government

Every state has a written constitution which forms the legal basis of its government, precisely as the constitution made at Philadelphia in 1787 forms the legal basis of the national government. Most of these forty-eight organic laws—even those in effect in the older states—date from comparatively recent times; but some of them have lasted through two or three generations, and a few are, to all intents and purposes, of Revolutionary origin. One of the signal contributions of the authors of American independence to political progress was, indeed, the drafting of written constitutions to serve as the basis for the new state governments.

The first state constitutions

Beginning with New Hampshire, eight colonies—in process of becoming states—adopted their first constitutions in 1776; and three others joined the list in the following year.<sup>2</sup> Connecticut and Rhode Island made only a few formal changes in their corporate charters, which thereafter served as state constitutions until 1818 and 1842, respectively. The people of Massachusetts went along

<sup>1</sup> The government of these local divisions will be described in Part V below.

<sup>2</sup> See pp. 70-71 above; W. C. Morey, "The First State Constitutions," *Annals Amer. Acad. Polit. and Soc. Sci.*, IV, 201-232 (Sept., 1893); W. C. Webster, "Comparative Study of the State Constitutions of the American Revolution," *ibid.*, IX, 380-420 (May, 1897); A. Nevins, *The American States During and After the Revolution*, Chaps. IV-V.

under a provisional government until 1780, when their first and only state constitution was adopted. This instrument, alone of the original series, was formally submitted to a popular vote before taking effect. Furthermore, it alone, of the constitutions adopted before 1783, was framed by a convention of delegates specially chosen for the purpose;<sup>1</sup> the others were made by legislatures or irregular revolutionary assemblages. Constitution-making by bodies brought into existence for that sole purpose, however, soon became the rule; and every state constitution in force to-day originated in this manner.

A state's  
power  
over its  
constitu-  
tion

When, therefore, the national government was set up, first under the Articles of Confederation, and later under the constitution of 1787, every state had a written constitution; and, although it is nowhere formally required, every one of the thirty-five states subsequently admitted came into the Union similarly equipped. Every state has, of course, the right to make and alter its own constitution. But this is not an absolute right. The state is a political division of undefined, yet limited, powers, and it can no more transcend the restrictions placed upon it by the national constitution in making or amending its fundamental law than in doing anything else. For example, it cannot, in its constitution, authorize *ex post facto* legislation or the use of bills of attainder. Before a state is admitted to the Union, Congress scrutinizes its proposed constitution, and if anything objectionable is found, admission may be held up until a change is made; although, as we have seen, a political requirement imposed in this way may, after the state is once admitted, be practically nullified.<sup>2</sup> Every state determines for itself how its constitution, once in force, may be amended or replaced with a new one.

Length of  
existing  
constitu-  
tions

Naturally, state constitutions vary considerably in contents, and therefore in length. But all of them are long documents; even the briefest ones run well beyond the national constitution in number of words, if not also in multiplicity of provisions. The ten shortest instruments are those of New Hampshire (1792), Vermont (1793), Connecticut (1818), Rhode Island (1842), New Jersey (1844), Indiana (1851), Iowa (1857), Kansas (1859), Tennessee (1870), and North Carolina (1876). These vary from fourteen

<sup>1</sup> W. F. Dodd, "The First State Constitutional Conventions, 1776-1783," *Amer. Polit. Sci. Rev.*, II, 545-561 (Nov., 1908). The New Hampshire constitution of 1778, although drafted by a specially chosen convention, was rejected when submitted to popular vote in 1779.

<sup>2</sup> This happened in the case of Arizona in 1912. See pp. 122-123 above.

closely printed pages in the case of New Jersey to nineteen pages in the case of New Hampshire. With only two exceptions, all were adopted before the Civil War. The ten longest constitutions are those of Maryland (1867), Missouri (1875), Colorado (1876), Georgia (1877), California (1879), South Dakota (1889), Alabama (1901), Virginia (1902), Oklahoma (1907), and Louisiana (1921). The shortest of this group is the constitution of South Dakota, which covers thirty-eight pages; the longest is that of Louisiana, which runs through almost ninety pages; the majority fall between forty and fifty pages. It will be noted that all were adopted since the Civil War, and four since 1900.

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As these facts indicate, state constitutions have steadily grown longer, the country over, in recent decades, and especially in the past fifteen or twenty years; new ones have been made exceptionally lengthy at the outset, and older ones have been lengthened out by process of amendment. What has happened is that a large number of subjects which formerly were either ignored or left to be dealt with by the legislature at its discretion have been incorporated in the constitution, sometimes occupying several paragraphs or even articles. Thus we now have elaborate provisions for the control of railways, banks, and other corporations; sections authorizing the enactment of workingmen's compensation and other laws for the benefit of the wage-earning classes; provisions prompted by the changed position of women in modern society; paragraphs dealing with the special problems created by the rise of great cities; and articles making detailed provision for popular education.<sup>1</sup>

Reasons for  
increased  
length

All of these matters are more suitable for legislative than for constitutional regulation. Why have they been brought into the constitutions at all? The first reason is to be found in a desire to overcome, or to anticipate, the effects of judicial decisions in the realm of social and industrial regulation. For example, a decision of the New York court of appeals in 1911 declaring a workingmen's compensation law unconstitutional led shortly to the adoption in that state of a constitutional amendment definitely conferring power on the legislature to enact such a law. Similar de-

<sup>1</sup>The Oklahoma constitution (1907) deals in great detail with a wide variety of subjects that might well be left to legislative discretion. For example, Article 13, on education, makes it the duty of the legislature to provide for a "uniform system of text-books in the common schools," and for the teaching therein of "the elements of agriculture, stock-feeding, and domestic science."

cisions holding invalid some exercise of power by the legislature, or by other branches of the state government, have resulted in constitutional amplification in many states. In the second place, additions have been made with a view to authorizing the legislature or the executive departments to do certain things—perhaps to engage in non-governmental activities—for which there seemed to be no clear basis in the existing constitution. In the third place, constitutional conventions have shown a marked tendency to incorporate in the constitutions prepared by them bodies of regulations which have already been in successful operation in their states on a legislative basis. Thus, in the Illinois constitution of 1848 were incorporated the detailed provisions relating to the organization of the inferior state courts which had been enacted by the legislature under the previous constitution. Again, whenever a constitutional convention first assembles, most of its members may be favorable to a short constitution dealing only with fundamentals; but it is soon discovered that each is in favor of detailed provisions upon matters in which he is specially interested or which he feels to be of fundamental importance. As a result, the convention usually ends with a new constitution longer than the old one. Furthermore, the more elaborate and detailed a constitution grows, the more frequently do new amendments become necessary; every new condition or unforeseen contingency tends to require a change, not simply statutory, but also constitutional.<sup>1</sup>

Distrust of  
legislatures

But the main explanation of our lengthy constitutions is yet to be mentioned, namely, the widespread distrust of state legislatures growing out of the abuses of legislative power, accompanied by much corruption, which marked the middle portion of the past century. With a view to averting these evils, later constitution-makers have drawn up long lists of specific restrictions upon the action of the legislature,<sup>2</sup> and, by the detailed treatment of many subjects in the constitution itself, have placed these matters beyond the reach of tinkering legislators. Confronted with the very practical problems of checking and preventing legislative abuses and corruption, constitution-framers have shown scant regard for the theoretical distinction between legislative and constitutional subjects and functions; and they will probably continue to do so until

<sup>1</sup> Consequently, constitution-framers should provide a correspondingly easy method of amendment; but the concessions thus far made in the direction of an easier amending process have nowhere kept pace with the multiplication of constitutional provisions.

<sup>2</sup> These are discussed more fully in Chap. xxxii below.

they have the courage to inaugurate such a reorganization of the state legislatures as will render constitutional restrictions largely unnecessary. Legislative reorganization, in other words, is a prerequisite in most states to a shorter constitution dealing only with fundamentals.

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Simplifying the state constitution by eliminating all but fundamental provisions relating to the organization and powers of government and the rights of citizens is not a matter of mere academic interest; it is a reform of great practical importance, for at least three reasons. In the first place, inserting legislative matters in the constitution is a good deal like locking up one's last will and testament in a safe-deposit box and throwing away the key. It is an effective means of preventing reconsideration, change, and reform. To the ordinary delays and difficulties of obtaining legislative action is added the necessity of securing a constitutional amendment, never an easy thing to do. In the second place, the increased number of subjects placed beyond the reach of the legislature has been responsible for much of the widespread popular criticism of the courts for declaring acts of the legislature unconstitutional. With shorter constitutions, fewer occasions would arise for the courts to overturn legislative enactments. Finally, from the expanded state constitution some courts have developed the doctrine of implied or resulting limitations, which still further ties the hands of the legislature on many occasions when action is desired. According to this judicial doctrine, the mere fact that a subject has been placed in the constitution indicates an intention on the part of the constitution-makers to take that subject entirely out of the hands of the legislature, and therefore is an implied denial of the right of the legislature to deal with any phases of the subject unless there is some express authorization in the constitution itself. It should be added, however, that this doctrine does not obtain everywhere; in some states the courts have held that the legislature has all power not denied to it by the constitution.

Why  
shorter  
constitu-  
tions are  
desirable

State constitutions naturally deal with a great number of subjects. First of all, there is an outline of the general frame of government, with provision usually for the three familiar branches, and always for the principal organs or agencies through which the state's authority is to be exercised. More extended provisions distribute power among these organs or agencies, and also between the state authorities, on the one hand, and local governmental units,

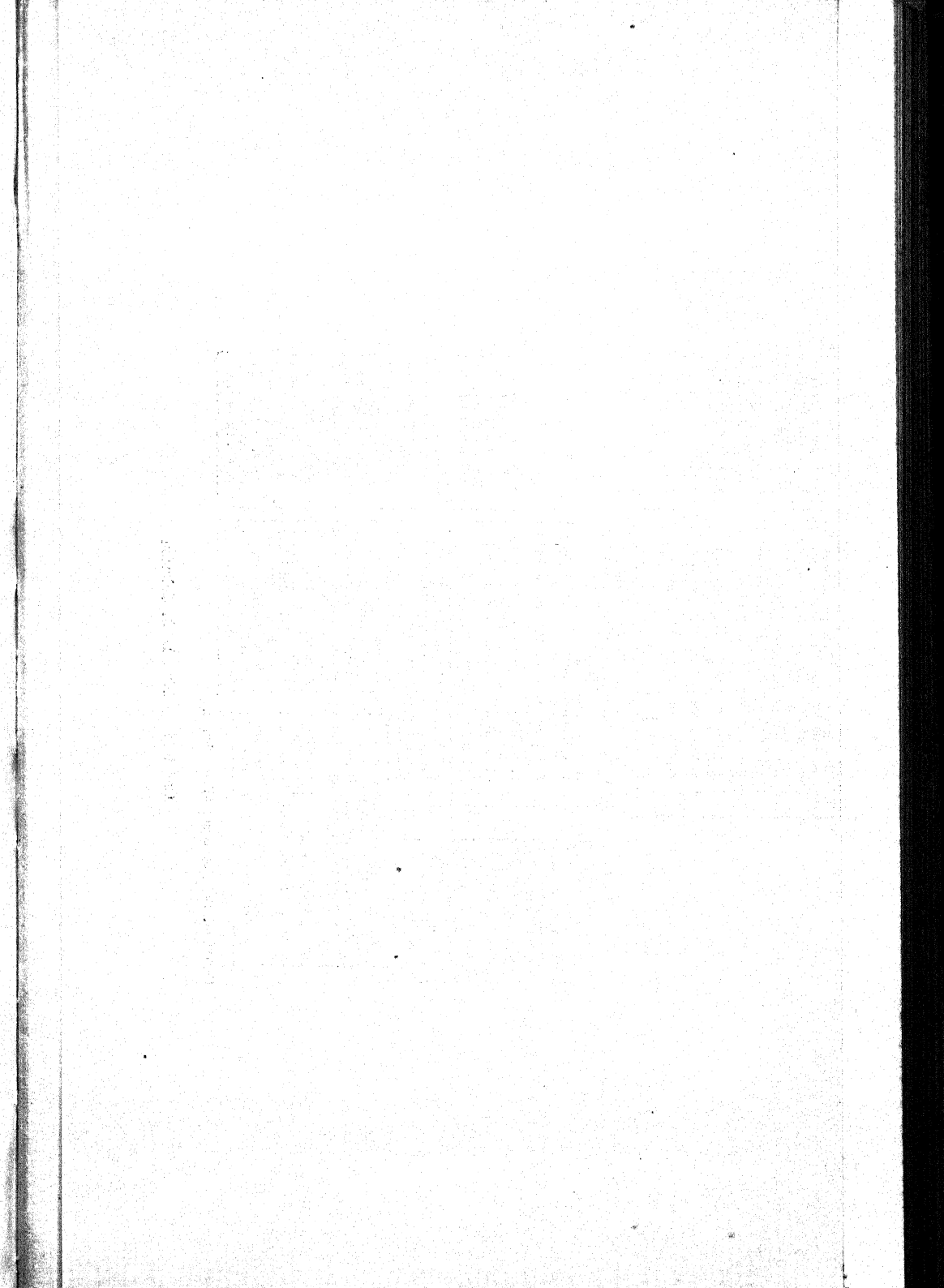
Contents  
of con-  
stitutions

such as counties and cities, on the other. Various leading activities, *e.g.*, taxation and finance, the regulation of banking, control of railroads and other public utilities, education, and different phases of industrial regulation, are likely to be dealt with in separate articles. There is usually, too, an article on suffrage and elections which, in addition to protecting the citizen from arrest and from military duty on election day, fixes the general and special qualifications for voting, and in a very general way regulates the conduct of elections. Another article stipulates the manner in which amendments may be proposed and adopted.

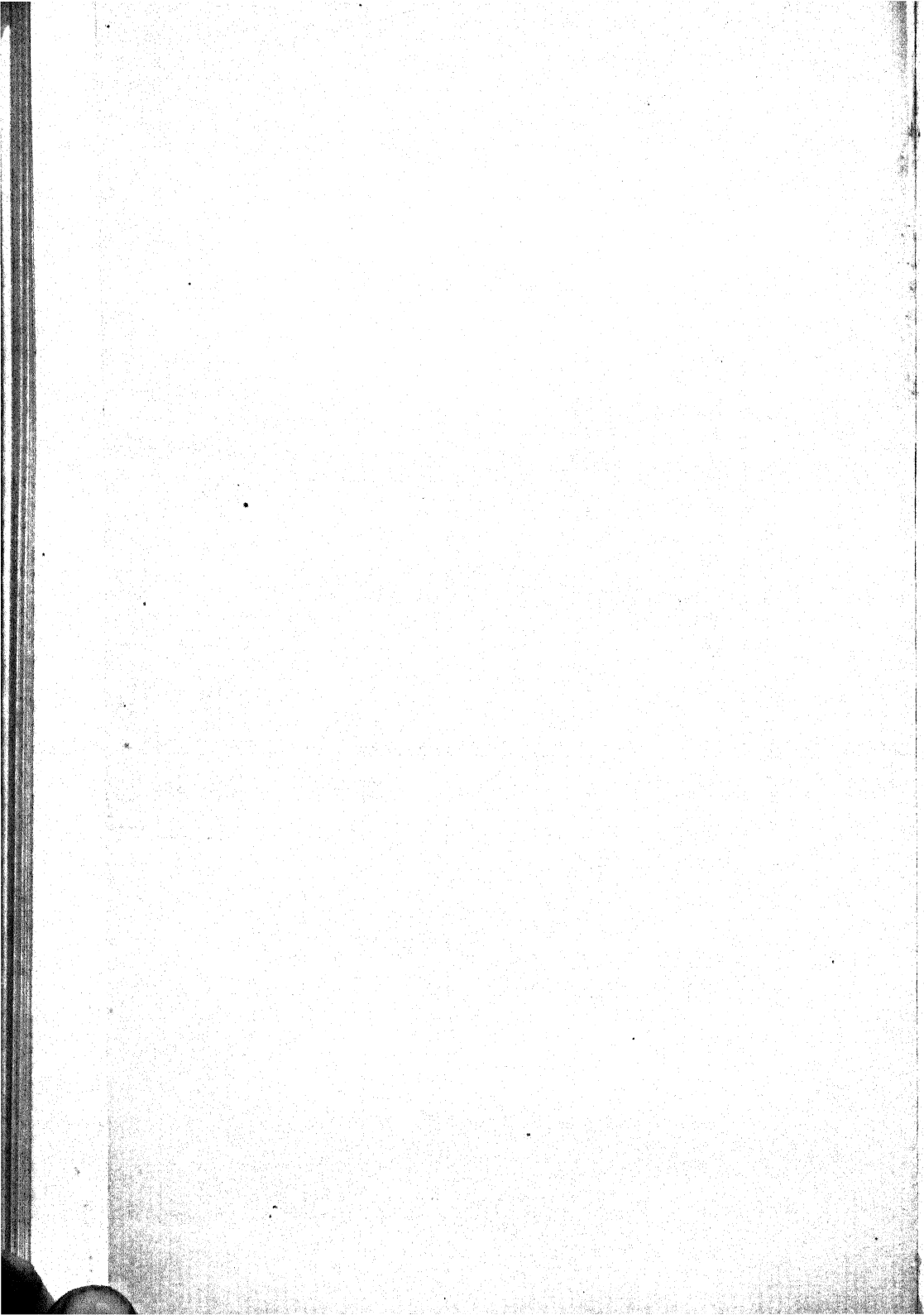
Finally, there is commonly an important, and often rather lengthy, article comprising a bill of rights. In the older constitutions, this is apt to include a statement of political theories which were in vogue in the late eighteenth and early nineteenth centuries—theories which in some instances are still generally adhered to, but which in other cases have been relegated to the lumber-room of discarded doctrines. The newer constitutions either omit these theories altogether or present them in a revised, modernized form. More important, in any event, are the provisions relating to certain concrete fundamental rights of the citizen, such as religious freedom and freedom of speech and the press, the right to keep and bear arms and to be exempt from unlawful searches and seizures, the privilege of the writ of habeas corpus, and the right to bail and to trial by jury; also the clauses which prohibit *ex post facto* laws, laws impairing the obligation of contracts, cruel and unusual punishments, and the deprivation of life, liberty, or property without due process of law. Many of these stipulations merely duplicate, of course, the limitations imposed upon the national government by the first eight amendments to the national constitution, and likewise those imposed upon the states in Article I, section 10, of that instrument;<sup>1</sup> and some of them constitute serious obstacles to the prosecution of crimes under modern conditions.

Important modifications of these ancient rights—especially the right of trial by jury and of indictment by grand jury—have been introduced in some of the more recent constitutions, notably that of Oklahoma; and new clauses have been inserted dealing with problems arising out of the remarkable growth of business corporations. Indeed, in view of the restrictions on the states contained in the first article of the national constitution and in that clause of the

<sup>1</sup> See pp. 157-158 above; also *Ill. Const. Conv. Bull.*, No. 15 (1920), "The Bills of Rights."







Fourteenth Amendment which prohibits the states from depriving any person of life, liberty, or property without due process of law, various provisions of the state bills of rights have become superfluous; and their retention often results in conflicting decisions of state and federal courts when interpreting duplicated clauses in the state and national constitutions. The state constitutions might well, therefore, be shortened by the excision of such clauses. It is difficult, however, to imagine a constitutional convention with the boldness and originality to propose the omission of any of the venerable guarantees; and they rarely fail to reappear in full array when a constitution is revised.

The formal alteration of a state constitution<sup>1</sup> is everywhere a more difficult and roundabout process than the alteration or repeal of a statute. At the present time, there are three principal methods of originating amendments to state constitutions, at least two being found in operation in the great majority of states,<sup>2</sup> namely, by popular initiative, by legislative proposal, and by the action of a constitutional convention. Amendments proposed in either of the first two ways must, in every state except Delaware, be ratified by the voters before becoming effective; and the same is almost universally true of amendments originating in constitutional conventions, although in some instances popular ratification has not been required.

Under the popular initiative, any individual or group of citizens may draft a proposed amendment and, by securing the signatures of a certain number of qualified voters to a petition, bring about its submission to a popular vote. If the proposal receives the number of votes required by the constitution, it is adopted and becomes, to all intents and purposes, as binding as if it had formed a part of the original instrument. The use of the popular initiative in connection with constitutional amendments began in Oregon in 1902 and is now authorized in twelve other states, the latest adoption being in Massachusetts in 1918.<sup>3</sup> To make an initiative effective, there

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Three  
methods of  
amending  
constitu-  
tions:

1. By  
popular  
initiative

(a) Pro-  
cedure

<sup>1</sup> It must not be forgotten that the provisions of state constitutions, like those of the national constitution, are often modified by executive, legislative, and judicial interpretation, and by custom or usage. For an example in Arkansas, see D. Y. Thomas, "Amending a State Constitution by Custom," *Amer. Polit. Sci. Rev.*, XXIII, 920-922 (Nov., 1929).

<sup>2</sup> For additional details concerning the different methods of amending constitutions, see *Ill. Const. Conv. Bull.*, No. 1 (1920), "The Amending Article;" and J. W. Garner, "The Amendment of State Constitutions," *Amer. Polit. Sci. Rev.*, I, 213-247 (Feb., 1907).

<sup>3</sup> The initiative for constitutional amendments is now authorized in Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Missouri, Nebraska,

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must be either a definite number of signatures, as 10,000 in North Dakota and 25,000 in Massachusetts, or a number equal to a certain percentage of the total vote cast for some specified state officer at the preceding state election. This percentage varies from eight in California and Oregon and ten in Michigan and Ohio to fifteen in Arizona, Oklahoma, and Nebraska; and with a view to insuring a fairly widely distributed demand for a proposed amendment, Missouri requires the signatures to come from voters in two-thirds of the congressional districts of the state. Several other states have a similar requirement.

(b) Limitations

In Massachusetts, the proposed amendment must first be submitted to the state legislature; and the approval of at least one-fourth of all the members of two successively elected legislatures, in joint session of the two houses, must precede a referendum. The legislature may submit to the voters a competing or substitute measure. In most states where the initiative is authorized for constitutional amendments, proposals may relate to any provisions found in the constitution, without restriction; but in Massachusetts there are several constitutional provisions which cannot be changed through the popular initiative.<sup>1</sup>

(c) Size of popular vote required

For the adoption of popularly initiated amendments, some states lay down requirements which do not apply to amendments originating in other ways. Thus in Massachusetts and Nebraska, an initiated amendment must receive not only a majority of all the votes cast thereon, but also thirty and thirty-five per cent, respectively, of the vote cast at the election. From the first adoption of the constitutional initiative in 1902 down to and including 1929, the number of amendments proposed by that method in the various states was 229, of which sixty-seven, or about thirty per cent, were subsequently ratified.

2. By legislative proposal

The method of originating amendments by legislative proposal is much older and more generally found than the popular initiative, and consequently is more frequently employed. Even in the states where amendments may be proposed under the popular initiative, a much larger number have been proposed by the legislature, namely, 556 for the period between 1900 and 1929, inclusive; and

Nevada, North Dakota, Ohio, Oklahoma, and Oregon. In 1914-16, Mississippi voted favorably on an amendment providing for the constitutional initiative; but, in October, 1922, the state supreme court held that the amendment had not been adopted legally. See *Amer. Polit. Sci. Rev.*, XVII, 434 (Aug., 1923); *Powers v. Robertson*, 130 Miss. 188 (1922).

<sup>1</sup> For the list of excepted subjects, see p. 73, n. 2, above.

of this number, about fifty per cent were adopted. In the country as a whole, the state legislatures submitted, during the same series of years, not far from 1,800 amendments, of which about sixty per cent were ratified. This second method is authorized in every state except New Hampshire.<sup>1</sup> In about one-fourth of the states, including Indiana, Massachusetts, New York, and Pennsylvania, proposed amendments must be passed by two successive legislatures; and in Delaware, this completes the amending process. In South Carolina and Mississippi, an amendment proposed by the legislature is voted on directly by the people, but the power to take final action is vested in the next succeeding legislature. In a majority of states, a proposed amendment must receive a two-thirds or a three-fifths vote of all members elected to each house, only nine states permitting a bare majority vote. There are other restrictions in some states which, alone or in combination with those just mentioned, make it almost impossible to amend the constitution without calling a convention; and it was largely because of these difficulties that the advocates of woman suffrage concentrated their efforts upon securing an amendment to the national constitution instead of waiting for separate state action.

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Limitations as to the number, the frequency, and the character of amending proposals are found in Illinois, Indiana, Pennsylvania, and eight other states. In Illinois, for example, no individual legislature may propose amendments to more than one article of the constitution, and in any case, amendments to the same article may not be proposed oftener than once in four years; while New Jersey, Tennessee, and Vermont<sup>2</sup> permit the submission of amendments only once in five, six, and ten years, respectively.

Limita-  
tions

Other obstacles to the adoption of amendments are to be found in the requirements concerning the size of the popular vote requisite for ratification. In most states, an affirmative majority of all votes cast on the proposal is sufficient; but in twelve states, including Illinois, Indiana, and Minnesota, a larger vote is necessary. At

Size of  
popular  
vote

<sup>1</sup> In that state, all amendments must originate in a constitutional convention.

<sup>2</sup> In Vermont, it is customary to appoint a commission to assist the legislature in preparing amendments to be submitted to popular vote. Such commissions have been employed also in New York (1872), Michigan (1873), Pennsylvania (1919), Virginia (1927), and California (1929). See E. C. Mower, "Constitutional Amendments in Vermont," *Amer. Polit. Sci. Rev.*, XVII, 72-79 (Feb., 1923); E. L. Burnham, "The Pennsylvania Commission on Constitutional Amendment," *Nat. Mun. Rev.*, X, 151-155 (Mar., 1921); W. D. Lewis, "Constitutional Revision in Pennsylvania," *Amer. Polit. Sci. Rev.*, XV, 558-565 (Nov., 1921).

least ten states require that a measure shall receive a majority of all votes cast at the election in which it is submitted. Inasmuch as fewer votes are generally cast for amendments than for the candidates voted for at the same election, this requirement "in effect provides that all abstinence from voting shall be treated as negative voting, and it has often proved impossible to obtain, even upon important questions, an affirmative majority of the total vote cast in the general election." For this reason, six out of thirteen amendments submitted by the Illinois legislature since 1870 have failed of adoption, although all but one of them received a greater affirmative than negative vote. For example, an amendment was submitted in 1916, authorizing some modification of the uniform general property tax, and received 656,298 affirmative votes and only 295,782 negative votes. Nevertheless, it failed of adoption, because the affirmative vote was less than a majority of 2,192,734, the total vote cast at this election for presidential electors.<sup>1</sup> In some states, this difficulty may be avoided by submitting amendments at special elections when no officers are to be chosen, in which case a majority of those voting on any particular amendment is usually equivalent to a majority of those voting at the election. Rhode Island and New Hampshire require that proposed amendments be approved by a three-fifths and two-thirds vote, respectively, of the electors voting thereon. In Indiana, amendments must be approved by a majority of all electors of the state; although the state supreme court has interpreted this to mean a majority of all electors voting at the election.

Number  
of amend-  
ments  
submitted

Many other states formerly had restrictions upon the amending process similar to those just mentioned. But there has been a very general tendency in the past two or three decades to do away with these obstacles and to make the adoption of amendments easier, the most conspicuous illustration being the setting up in some states, as we have noted, of the popular initiative as an alternative to legislative action. The states showing the greatest activity prior to 1920 were California with a total of 150 amendments submitted, Louisiana with 134, Oregon with 88, Ohio with 71, and Colorado, Georgia, New Jersey, South Dakota, and Michigan each with fifty or more. Since 1920, California, with 80, has again far outstripped her sister states in the number of amendments submitted either by

<sup>1</sup> For similar results in Minnesota, see W. Anderson, "The Need for Constitutional Revision in Minnesota," *Minnesota Law Rev.*, XI, 189-216 (Feb., 1927).

the legislature or through popular initiation, her nearest competitor again being Louisiana with 43.<sup>1</sup>

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When only a few specific amendments are to be considered and quick results are desired, the methods of popular initiative and legislative proposal are to be preferred. But when a thoroughgoing revision is contemplated, they are hardly adequate.<sup>2</sup> This can best be undertaken by a constitutional convention, consisting of delegates specially chosen by the voters for the purpose. A convention, however, is a cumbersome and expensive device, and one not calculated to bring about immediate changes, however urgent they may be; indeed, in some states a constitutional convention cannot be authorized, elected, and assembled, and its work submitted to the voters, in much less than three or four years. In New Hampshire, the constitutional convention is the only authorized method of proposing amendments, but in all other states except Rhode Island it is an alternative method. It is expressly or impliedly authorized by the constitutions of three-fourths of the states; and in the remaining twelve it is the generally accepted view that the legislature may legally provide for the meeting of a convention, notwithstanding that the constitution is silent on the subject. As a matter of fact, conventions have been assembled in all of these states with the exception of Rhode Island.<sup>3</sup>

3. By constitutional conventions

In Maine and Georgia, the legislature is given full power to call a convention without waiting for any popular mandate on the subject; but in the great majority of states the question whether a convention shall be called is first submitted to popular vote,

(a) Calling conventions

<sup>1</sup> In South Carolina, the total number of amendments would probably exceed that of California; but as the great majority of them merely authorize changes in the debt limits of particular municipal corporations, they are not included in the above summary.

<sup>2</sup> In a few instances, the legislature has submitted to popular vote an extensive revision of the constitution. This occurred in Michigan (1874), Rhode Island (1898, 1899), Connecticut (1907), Indiana (1911), and Virginia (1928). In the first three states, the revision was rejected; in Indiana, the supreme court enjoined the submission of the revised draft; only in Virginia was the revision approved by the voters. See *Amer. Polit. Sci. Assoc. Proceedings*, VII, 43-52 (1911).

<sup>3</sup> Because the Rhode Island constitution makes no provision for a constitutional convention, the supreme court of that state held, in 1883, that there is no legal way by which such a convention can be called. Nevertheless, in 1923-24 a prolonged deadlock occurred in the Rhode Island senate over the attempt of the Democratic minority, assisted by the presiding officer, to force the Republican majority to approve the submission to the electorate of the question of holding a constitutional convention as a means of breaking up the grossly unequal system of representation in the state legislature. See *In re The Constitutional Convention*, 14 R. I. 649 (1883); C. C. Hubbard, "Legislative 'War' in Rhode Island," *Nat. Mun. Rev.*, XIII, 477-480 (Sept., 1924).

although the constitution may not expressly require it.<sup>1</sup> The submission of this question periodically is required in seven states, namely, New Hampshire, every seven years; Iowa, every ten years; Michigan, every sixteen years; and Maryland, New York, Ohio, and Oklahoma, every twenty years. In all of these states except Maryland and New Hampshire, the question may also be submitted at other times. Where the popular initiative exists, it is not always clear that the question of calling a convention may be brought to a vote independently of any legislative action; but such procedure seems to be authorized in Arizona, Michigan, Maine, Oregon, Missouri, and Oklahoma.

The size of the popular vote required to authorize a constitutional convention varies. In eighteen states, including New York and Ohio, a majority of those voting on the proposition is sufficient, except in Kentucky, where the majority must also equal one-fourth of the votes cast at the preceding election; fourteen states, including Illinois, Minnesota, and Nebraska, require approval by a majority of those voting at a general election, as in the case of amendments originating in legislatures; and Michigan requires a majority vote of the electors qualified to vote for members of the legislature. In all, about 216 constitutional conventions have been held, the most recent being those in Ohio (1912), New York (1915), Massachusetts (1917-19), Arkansas (1918), Nebraska, New Hampshire, and Illinois (1920), Louisiana (1921), Missouri (1922), and New Hampshire (1930).<sup>2</sup>

When a constitutional convention is to be held, detailed provisions usually have to be made by the legislature for the nomina-

<sup>1</sup> H. Hendricks, "Some Legal Aspects of Constitutional Conventions," *Texas Law Rev.*, II, 195-207 (Feb., 1924).

<sup>2</sup> Brief summaries of the work of some of these recent conventions will be found in the following articles: R. E. Cushman, "Voting Organic Laws in Ohio," *Polit. Sci. Quar.*, XXVIII, 207-299 (June, 1913); S. G. Benjamin, "The Attempted Revision of the State Constitution of New York," *Amer. Polit. Sci. Rev.*, X, 20-43 (Feb., 1916); L. B. Evans, "The Constitutional Convention of Massachusetts," *ibid.*, XV, 214-232 (May, 1921); A. E. Sheldon, "The Nebraska Constitutional Convention of 1919-1920," *ibid.*, XV, 391-400 (Aug., 1921); L. D. White, "The Tenth New Hampshire Convention," *ibid.*, XV, 400-403 (Aug., 1921); C. A. Berdahl, "The Louisiana Constitutional Convention," *ibid.*, XV, 565-568 (Nov., 1921); T. G. Gronert, "The Louisiana Constitutional Conventions of 1913 and 1921," *Southwestern Polit. Sci. Quar.*, IV, 301-318 (Mar., 1924); E. Freund, "A New Constitution of Illinois," *New Republic*, XXXIII, 67-69 (Dec. 13, 1922); W. W. Hollingsworth, "The New Constitution Proposed for Missouri," *Nat. Mun. Rev.*, XIII, 96-102 (Feb., 1924); I. Loeb, "The Missouri Constitutional Convention," *Amer. Polit. Sci. Rev.*, XVIII, 18-33 (Feb., 1924); J. P. Richardson, "New Hampshire Constitutional Convention of 1930," *ibid.*, XXIV, 1022-1024 (Nov., 1930).

tion, election, convening, and compensation of the members, and for the submission of their work to the voters. Constitutions vary greatly in the extent to which they go into these matters. Almost all of them make provision for the apportionment of delegates, but in eight states all other details are left entirely to the legislature. On the other hand, in three states (New York, Michigan, and Missouri) the constitution itself contains detailed provisions on all of these points, so that the convention assembles as a matter of course after being authorized and elected, without the necessity of any legislative action. In most states, the constitution contains a few provisions with respect to the time and method of electing delegates, and perhaps some other points, but leaves most of the details to be provided for by legislation.<sup>1</sup>

Constitutional conventions sometimes contain as few as eighty members and sometimes more than four hundred;<sup>2</sup> in most instances they do not exceed two hundred. The delegates are nominated and elected in accordance with the general primary and election laws, although some states, for example, Massachusetts, have made special provision for non-partisan nomination and election. They are usually chosen from the legislative or senatorial districts employed in electing members of the legislature, and not infrequently a few are elected from the state at large.<sup>3</sup> The Illinois convention of 1920 consisted merely of two delegates from each of the fifty-one senatorial districts of the state; the New York convention of 1915 consisted of three delegates from each senatorial district and fifteen elected at large; the Massachusetts convention of 1917 had from one to three delegates from each legislative district, four additional delegates from each of the sixteen congressional districts, and sixteen elected at large—a total of three hundred and twenty. (b) Size

The convention assembles at the state capital on the day designated by law, and organizes by electing one of its members president. (c) Organization

<sup>1</sup> In 1921, the Iowa legislature refused to carry out the popular vote of the preceding November which had been favorable to the calling of a constitutional convention. See *Nat. Mun. Rev.*, X, 315-316 (June, 1921).

<sup>2</sup> The New Hampshire conventions of 1912, 1919, and 1930 numbered 413, 404, and 460, respectively.

<sup>3</sup> The over-representation of rural districts as compared with urban communities, which is found in a number of state legislatures (see Chap. XXXI below), is apt to appear also in the constitutional conventions. Consequently, the representatives of rural sections may exert a greater proportional influence for or against proposed amendments when they originate in the legislature or in a constitutional convention than when originating under the popular initiative. Under the latter, the vote of any citizen counts as much in one section of the state as in another.



dent, providing for a staff of clerks, secretaries, and stenographers, and adopting a set of rules to govern its proceedings. A large body is ill-adapted to the detailed consideration of the great variety of subjects which always come before a constitutional convention, and therefore a somewhat elaborate committee system is employed. The committees are commonly appointed by the president of the convention, although in a few instances committee assignments have been made by a committee specially constituted for that purpose. The number and size of committees naturally vary: in the New York convention of 1915 there were thirty; in the Virginia convention of 1901-02, sixteen; in the Ohio convention of 1912, twenty-five; in the Massachusetts convention of 1917, twenty-four; and in the Illinois convention of 1920, twenty-five. In size, the committees vary from about three members on the less important ones to about twenty on the most important, the average in the recent conventions of Ohio, New York, Massachusetts, and Illinois being approximately fifteen. These committees function very much as do those of a state legislature.

(d) Procedure

To each committee is customarily assigned one or more sections or articles of the constitution, and all proposed changes, originating either with members of the convention or with people outside, are referred to the appropriate committee for preliminary consideration. Committee sessions are often thrown open to the public, and an opportunity is almost always given the advocates and opponents of various changes to present their respective arguments. If the committee approves a given proposal, it is reported to the convention, with or without modification, and is placed on the calendar for consideration in committee of the whole. In general, the proceedings of a constitutional convention and its committees follow the same course as the proceedings of a state legislature.

Indeed, constitutional conventions are legislative bodies whose primary, if not sole, function is to draft a new fundamental law for the state or to formulate amendments to the existing constitution. Some conventions, like that in Illinois in 1862,<sup>1</sup> have gone farther than this and have assumed more or less actual management of the state government, displacing existing officers, substituting others chosen by the convention, and attempting to

<sup>1</sup> On the history of this interesting body, see O. M. Dickerson, "The Illinois Constitutional Convention of 1862," in *Univ. of Ill. Studies*, I (1905); and *Ill. Const. Conv. Bull.* (1920), "Constitutional Conventions in Illinois," 18-21.

supersede the legislature in various matters. At other times, the legislature, in making provision for the meeting of a convention, has attempted to impose limitations upon its work which the convention has wholly or in part disregarded. Naturally, conflicts have resulted as to the proper scope of authority; and out of them three theories have developed.<sup>1</sup> According to the first, the legislature is supreme, and in the act of calling the convention may limit the powers of that body by excluding from its consideration amendments to certain sections of the constitution, by requiring it to submit amendments to certain other sections, by prescribing the manner in which the work of the convention shall be submitted to popular vote, and in various other ways. Those who take this view hold that the convention has no right to disregard or to deviate from any of these statutory restrictions. According to the second theory, the convention is possessed of all sovereign powers of the people, and is the supreme body in the state during its existence, being therefore superior to the legislature or any other branch of the state government. It may disregard any or all limitations which the legislature tries to impose upon its activity, and may, indeed, legally exercise whatever governmental functions it cares to assume.

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(e) Three  
theories as  
to the  
authority  
of a con-  
vention

Each of these two theories has some support in convention precedents and judicial opinion. But the view now most generally held is that a convention is neither sovereign nor wholly subject to the legislature—that, on the contrary, the two are coördinate bodies, each supreme within its proper sphere and bound by the provisions of the existing constitution and statutes. If the constitution authorizes the legislature to impose restrictions on the convention, this body is bound to respect such limitations; on the other hand, if such authorization is lacking, the legislature cannot bind the convention as to what shall be placed in the revised constitution, or lay other restrictions upon it. The convention, furthermore, may neither supersede any existing organs or agents of state government nor exercise any of the powers assigned to them; its functions are limited to proposing a new constitution or amendments to the existing constitution.

Almost invariably the results of a convention's deliberations

<sup>1</sup> A good short discussion of these theories is to be found in A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 126-132; and A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, I, 424 ff.

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XXX(f) Sub-  
mission of  
the work  
of a con-  
vention

have to be submitted to the voters for their approval before going into effect; although in a dozen or more instances in the past hundred years constitutions have gone into operation without popular ratification, the latest being the Virginia constitution of 1902 and the Louisiana constitutions of 1913 and 1921. The vote required for the ratification of the work of a convention is the same as that required for the adoption of amendments proposed by the legislature. A convention may submit its work to the voters in one of three different forms. It may present it as a series of specific amendments, to be voted on separately. This is practicable when only a comparatively small number of amendments are submitted, and was the course followed by the Massachusetts convention in 1917 and 1918, when three and nineteen amendments, respectively, were referred to the electorate. It was also the plan followed in Ohio in 1912, when forty-two proposals were submitted, and in Nebraska in 1920, when forty-one were submitted; although in these instances the numbers were quite properly regarded as excessively large for such procedure. In the second place, a convention may submit a complete new or revised constitution, to be accepted or rejected as a whole, as happened in Michigan in 1908, in Arkansas in 1918, and in Illinois in 1922. This method has the serious disadvantage of forcing non-controversial changes to suffer the same fate as articles which relate to controversial subjects. The opposition to the initiative and referendum, or to changes in the system of taxation, for example, may be so strong that, rather than see them adopted, their opponents will vote against the entire document, although everything else in it may be quite satisfactory. This is what happened in Illinois in 1922.

The third method is a compromise between the two plans just described. A complete revision of the constitution may be submitted as a single document to be rejected or approved as a whole, and at the same time one or more controversial sections may be submitted separately. This enables the electorate to approve the greater part of the convention's work and yet to disapprove certain specific features. Such a plan was followed in Illinois in 1870, when eight separate articles were submitted along with a new and substantially complete constitution; and in New York in 1915, when two proposals were separately submitted along with a liberally revised constitution. Despite rather fulsome praise accorded to constitutional conventions at times, their work does

not seem to be strikingly superior to the changes wrought either by legislative proposal or by popular initiative.<sup>1</sup>

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Nature of  
recent  
amend-  
ments

The great variety of subjects dealt with in recent constitutional amendments can be indicated in only the most general way. More proposals have had to do with taxation than with any other matter; 257 of this nature were submitted before 1920, of which 142 were adopted. Others have related, in considerable but varying numbers, to prohibition, suffrage qualifications, labor legislation, control of corporations of one kind or another, municipal home-rule, indebtedness, ownership of utilities, direct primary laws, absent-voting, the initiative, referendum, and recall, simplification of the amending process, changing elective state offices into appointive ones, providing for an executive budget, enlarging the veto power of the governor and his powers in other respects, extending the constitutional debt limit, authorizing the state to engage in non-governmental undertakings of a business nature, increasing the number of judges or the number of courts, and forbidding a law to be declared unconstitutional by the supreme court if more than one judge dissents.<sup>2</sup>

<sup>1</sup> Compare W. F. Dodd, *State Government* (2nd ed., 1928), p. 96, and A. N. Holcombe, *State Government in the United States* (2nd ed., 1826), p. 475.

Some of the more recent conventions, notably the Michigan convention of 1908, the Ohio convention of 1912, and the Illinois convention of 1920-22, issued addresses in pamphlet form for circulation among the voters of the state, in which all the main features of their work were set forth, together with explanations of the various changes proposed.

The Model State Constitution adopted by the National Municipal League of 1921 provides three methods of constitutional amendment (sections 94-98), as follows: (1) A majority of all the members of the legislature may submit proposals of amendment, which become effective if approved by a majority of those voting thereon, provided the affirmative vote is not less than twenty per cent of those voting at the election. (2) Amendments may be submitted by popular petition signed in at least one-half of the counties of the state by a number of qualified voters equal to five per cent of the total vote cast for governor at the last election. For adoption, the same vote is required as in (1) above. (3) The question of calling a constitutional convention may be submitted either by a majority of all the members of the legislature or by a popular petition signed as provided in (2) above. The convention is held if the affirmative vote exceeds the negative vote and is not less than twenty per cent of the total vote cast at the election. Amendments submitted by the convention may be adopted by a majority of those voting thereon.

<sup>2</sup> On recent constitutional amendments, see annual editions (to 1919 and since 1925) of the *American Year Book* (New York); *Amer. Polit. Sci. Rev.*, IX, 101-107 (Feb., 1915); X, 104-109 (Feb., 1916); XII, 268-270 (May, 1918); XIII, 429-447 (Aug., 1919); XVI, 245-275 (May, 1922); XVII, 72-79 (Feb., 1923); XIX, 541-544 (Aug., 1925); XXIII, 102-105, 404-410 (Feb.-May, 1929); XXIV, 367-370 (May, 1930); *Nat. Mun. Rev.*, X, 235-238 (Apr., 1921); XII, 200-202 (Apr., 1923); XV, 42-65 (Jan., 1926); XVI, 642-661 (Oct., 1927); XVIII, 429-430 (June, 1929); *Polit. Sci. Quar.*, Supp., XI, 80-99 (Mar., 1925), XLI, 69-72 (Mar., 1926).

The future seems to promise two possible lines of state constitutional development. If the present tendency to incorporate in the constitution matters not of fundamental importance but primarily of a legislative character, and to deal with these matters in detail, continues unabated, more and more frequently will amendments become necessary in order to meet changed conditions. This should lead to the adoption of easier amending processes, *i.e.*, processes increasingly resembling those now employed in the enactment of ordinary statutes either by the legislature or by direct popular action through the initiative and referendum. In this way, the historic dividing line between constitutional and statutory laws will become more and more hazy, if not quite indistinct; and we may ultimately arrive at substantially the same procedure for the enactment of both. On the other hand, we may see a reaction against the comprehensive and bulky constitutions of the past few decades in favor of shorter instruments dealing only with matters of a fundamental and truly constitutional nature. Should this come about—the indications that it will are only slight—there will obviously be less need of frequent amendment, and the present sharp distinction between the modes of enacting constitutional provisions and ordinary statutes may be expected to continue to be reflected in more difficult amending procedure.

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<sup>1</sup> The most convenient and complete compilation of the constitutions in force at the date of publication.

## CHAPTER XXXI

### THE LEGISLATURE: STRUCTURE AND COMPOSITION

A cursory examination of the constitutions of the forty-eight states will disclose the fact that with only three exceptions<sup>1</sup> the article relating to the structure and composition of the legislative department precedes the sections devoted to the executive and judicial branches. This order of precedence is fully justified.

Essentials  
of a good  
law-making  
body

The legislature<sup>2</sup> is the main policy-determining organ of the state government; and, in that capacity, its potentialities for good and for evil are almost unlimited. Every citizen, therefore, ought to be solicitous that it be not unduly hampered by constitutional restrictions, and that it be of such outward structure and such internal organization as will render it an effective and responsible agency of the public will. It should not be of such size as to be unwieldy; nor should its form be such as needlessly to complicate the process of law-making, or to facilitate evading responsibility for what it enacts or fails to enact. Its internal organization and the rules governing its proceedings should be free from unnecessary complications, should seek to expedite work while yet giving each bill a fair opportunity to be considered, and should ensure full publicity for discussions, committee reports, and decisions. In the handling of financial legislation, there should be close coöperation between those agencies of the government which are charged with raising the state's revenue and those which are authorized to appropriate and expend it. Endowed with extensive powers to control, for weal or woe, most of the business and social relationships of citizens, as well as to regulate their civil rights and duties, the law-making body should manifestly be composed of persons who are at least reasonably representative of the principal geographical sections and of the main social and economic groups within the state. The members should be chosen on a basis, and in a manner,

<sup>1</sup> Colorado, Kansas, and Maryland.

<sup>2</sup> This is the term commonly employed; but it may be noted that in about half of the states, the body is officially known as the "general assembly," in a few states as the "legislative assembly," and in Massachusetts and New Hampshire as the "general court."

calculated to give all important elements a chance to be heard. Although highly desirable, it is not essential that they be experts in either the technique or the subject-matter of legislation. It is indispensable, however, that they have the assistance of expert draftsmen; that they be in a position to avail themselves of expert advice concerning the complicated problems which come before them; and that they be able to draw freely upon the experience of other states, and of all officials charged with the administration of the laws which they enact.

Any one at all familiar with the organization and workings of our state legislatures knows that no one of the forty-eight fulfills all of the foregoing requirements, and that few attain to more than one or two of them. Many reasons can be assigned. For the present, it will suffice to mention only the most fundamental one, which is the fact that hitherto the ingenuity of constitution-makers has been expended chiefly upon defining and restricting the legislature's powers, on the apparent assumption that the legislature is itself, at best, a necessary evil; with the result that little has been done toward working out plans by which the legislature can be made a really responsible law-making body, able to promote the general welfare of the people of the state by wise, carefully drawn, and well-considered laws.

Every state legislature is organized in two houses, both elective,<sup>1</sup> and both endowed with substantially the same powers. In the original thirteen states, the bicameral plan arose naturally out of the conflict between aristocratic and democratic elements in the colonial period; and by the close of the Revolution it had been adopted in all of them except Pennsylvania and Georgia.<sup>2</sup> In the states later admitted to the Union, the plan was followed as a result of more or less conscious imitation of the older states, or of the national Congress, but with little of the justification which existed in the earlier cases; in part, it has been perpetuated through unquestioning adherence to the ancient formula of divided powers and checks and balances. Under the earliest state constitu-

Bicameral  
structure

<sup>1</sup> Candidates for election to the legislature are nominated in some states, mainly in the South, by a convention, but in most states by direct primary. Election is by printed ballot (except where voting machines are employed); and the polling often occurs on the same date as presidential and congressional elections.

<sup>2</sup> Four of the oldest states have had a unicameral legislature: Delaware, until 1776; Pennsylvania, until 1790; Georgia, 1777-1789; and Vermont, until 1836. See T. F. Moran, "Rise and Development of the Bicameral System in America," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XIII (Baltimore, 1895).



tions, there were higher property qualifications for membership in the state senate, and for the privilege of voting for senators, than in the case of the other branch of the legislature; so that the two houses were elected by different constituencies and represented somewhat different social and economic groups or interests. This distinction, however, long ago disappeared; and practically the only differences to-day between the two houses are the longer term for which senators are usually chosen,<sup>1</sup> the slightly higher age or residence qualifications for membership in the senate, and the fact that the terms of senators usually do not all expire at the same time as do the terms of members of the lower house. So far as determined by suffrage qualifications, the electorates for both houses are now identical. "Each chamber is, in short, a mere duplication of the other; neither is more conservative or radical than the other, and each is subject to the same influences. Thus it has come about that the state employs two substantially identical organs to perform the same functions."<sup>2</sup> The retention of the bicameral system has to be justified mainly on the ground that it provides representation for distinct territorial areas in one branch and for units of population in the other; or that it is effective as a means of preventing undesirable legislation by ensuring, presumably, a double consideration for all laws prior to their enactment.

Is the retention of the bicameral system justified?

The first of these possible justifications has not commended itself to the majority of our states; in only a very small group is either house made up solely of representatives from territorial areas as such. The bicameral system undoubtedly facilitates the maintenance of a balance of power between city and country districts, and therefore finds support as a mode of protecting the rights of rural minorities against the possibility of infringement by urban majorities. Defenders of the system are, however, more apt to lay stress upon the checking, or revising, function which the two-house plan supposedly ensures. For entirely satisfactory conclusions on this point, there is need of a thorough study, in a number of typical states, of the actual rejections and amendments

<sup>1</sup> In thirty-one states, the term of senators is four years; in sixteen states, two years; and in one state (New Jersey), three years. The term of members of the lower house is one year in two states (New Jersey and New York), four years in four (Alabama, Louisiana, Maryland, Mississippi), and two years in all the rest. For tables showing the membership, terms, and frequency and limitations of sessions in the various states, see *Mass. Const. Conv. Bull. No. 9* (1917), 7-8; *Ill. Const. Conv. Bull. No. 8* (1920), "The Legislative Department," 534; *Congressional Digest*, V, 222 (Sept., 1926).

<sup>2</sup> J. W. Garner, quoted in J. M. Mathews and C. A. Berdahl, *Readings in American Government*, 658.

by each house of measures originating in the other house. Unfortunately, such studies have been made in only a very few states, notably in the case of the New York legislature of 1910.<sup>1</sup>

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Of 1,036 bills passed by the New York senate in the year mentioned, only 69 were rejected by the lower house, or assembly; and of 1,120 passed by the assembly, only 161 were rejected by the senate. In other words, the senate killed fourteen per cent of the assembly bills, and the assembly killed six per cent of the senate bills. Even this low mortality rate might have been significant if the defeated bills had proposed radical changes in public policy. As a matter of fact, however, they were relatively unimportant measures. The veto of neither house was as effective as that wielded by the governor and by city authorities,<sup>2</sup> who killed 240 measures passed by both houses, or twenty-five per cent of the total number. Furthermore, appropriations were reduced thirteen times as much by the governor's veto as by the veto of the senate upon money bills originating in the assembly. It also appears that of the 967 bills which passed both houses, 505 passed the second house without any change whatever, and that 58 of them were afterwards recalled by the house in which they had originated; while 102 others were vetoed. Apparently, therefore, the bicameral legislature in New York failed, in 1910 at all events, to fulfill one of the chief functions for which it is often contended that a bifurcated legislature is essential.

Working of  
the bicam-  
eral system  
in New  
York

A similar careful study of the work of the Illinois legislature in 1919 shows that the house killed twenty-five per cent of the bills originating in the senate, while the latter killed only nine per cent of the house bills coming to it. In 1921, the corresponding figures were forty-five and eleven per cent, respectively. In Wisconsin, in 1919, the senate and assembly each defeated thirteen per cent of the bills coming from the other branch; and in 1921, the percentages were again exactly the same for the two houses, namely seventeen. As in the case of the New York legislature, the majority of the bills which thus failed of enactment were relatively unimportant, if not quite insignificant; none of them would be classed as vicious or even of dangerous tendency, while a few

In Illinois  
and Wis-  
consin

<sup>1</sup> See D. L. Colvin, *The Bicameral Principle in the New York Legislature* (New York, 1913); J. D. Barnett, "The Bicameral System in State Legislatures," *Amer. Polit. Sci. Rev.*, IX, 449-466 (Aug., 1915); *Ill. Const. Conv. Bull.* No. 8 (1919) "The Legislative Department," 528-532.

<sup>2</sup> Acts affecting particular cities may, under the New York constitution, be accepted or rejected by the city authorities.

might fairly be characterized as not undesirable. At the very least, therefore, it may be said that these figures constitute no very impressive argument for the retention of the bicameral system on the ground that one chamber exercises a wholesome check upon the legislative output of the other.<sup>1</sup> If, in this connection, one recalls the fact that everywhere, except in North Carolina, the governor is endowed with the veto power, and that the power of the courts to declare laws unconstitutional is fully developed, it is not easy to avoid the conclusion that the value of the bicameral system, as a means of setting up an additional hurdle over which legislative measures must pass before becoming laws, is hardly sufficient to warrant its retention, in view of the positive evils which accompany, and in some instances are inseparable from, that system.<sup>2</sup>

Abandonment of the bicameral system in cities and in Canadian provinces

It is significant that many a city which started out with a bicameral council has long since abandoned it, because of the delays which it entailed, the friction which frequently arose between the two chambers, the increased expense involved, and the manifold opportunities afforded for chicanery and corruption. To-day, not one of our twenty-five largest cities retains the bicameral council.<sup>3</sup> Yet in some of these cities the single-chambered council not only represents more people than does many a state legislature, but also raises and appropriates more money and deals with important matters affecting the interests of more people than a considerable number of our state legislatures put together. The same abandonment of the bicameral system has taken place in six of the Canadian provinces, and to-day eight of the nine provinces have single-chambered legislatures. In all the states forming the German Reich, except Prussia, and in the great majority of Swiss cantons, the legislature is unicameral, as is the national parliament in Bulgaria, Yugoslavia, and Norway.<sup>4</sup>

<sup>1</sup> M. W. Simons, "Operation of the Bicameral System in Illinois and Wisconsin," *Illinois Law Rev.*, XX, 674-686 (Mar., 1926). For similar facts relating to the New Mexico legislature of 1925 and the Nebraska legislatures of 1921 and 1923, see J. E. Hall, "The Bicameral Principle in the New Mexico Legislature," *Nat. Mun. Rev.*, XVI, 185-190, 255-260 (Mar.-Apr., 1927); R. S. Boots, "Our Legislative Mills: Nebraska," *ibid.*, XIII, 118 (Feb., 1924). Cf. V. J. West, "California—the Home of the Split Session," *ibid.*, XII, 369-370 (July, 1923).

<sup>2</sup> The "model state constitution" proposed by the National Municipal League in 1921 provides for a unicameral legislature, the members of which are to be chosen by a system of proportional representation.

<sup>3</sup> In the enactment of certain "local laws" the board of estimate acts as a second legislative chamber in New York City.

<sup>4</sup> It should also be borne in mind that when we proceed to enact our most

The advantages of the unicameral system are unmistakable. In the first place, it enables public attention to focus promptly upon a narrow and well-defined area, and therefore permits of a real scrutiny of legislative proceedings while laws are being made, a thing which is practically impossible in the case of our present large two-chambered legislatures with their multitude of committees. In the second place, when there is but one chamber, responsibility cannot be bandied back and forth between two houses, members of one house working with members of the other to defeat legislation, and putting it beyond the power of the public to fix the responsibility. In the Ohio legislature of 1919, a competent eye-witness observed that bills were passed in one house out of courtesy to one member or another, or for political reasons, with a reasonable certainty that they would be "put to sleep" in the other body. Opponents of certain bills declared quite openly that they cared little if the measures objected to were acted upon favorably in the house in which they were introduced, since they could be better attacked in the other house. The same witness adds: "Each house became, so far as legislation initiated by the other is concerned, either a mere formal ratifying body, or a pleasant and easy legislative death-bed, as per agreements made beforehand."<sup>1</sup> In this matter, the Ohio legislature is not exceptional; the same practices appear in probably every state.

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Advantages  
of the uni-  
cameral  
legislature

Agreements of the kind just mentioned are facilitated by the existence of a dual committee system in the great majority of states, each house having its full set of committees. This duplication furnishes abundant opportunities for shifty deals between two sets of committees, and two sets of political leaders, which still further serve to cloud issues and dissipate responsibility. The disappearance of the dual committee system (including the peculiarly irresponsible and autocratic conference committees), which would, of course, follow the abandonment of the bicameral system, would greatly simplify the legislative process and eliminate much of the delay which nowadays blocks good as well as bad measures. Many bills which have passed one house fail to become laws merely by reason of the inaction of the other house, and not because of fundamental organic law, the state constitution, we invariably employ, not a bicameral body, but the single-chambered constitutional convention.

<sup>1</sup>C. A. Dykstra, in *Civic Affairs*, August, 1919. See also J. W. Garner, "Legislative Organization and Representation," *Ill. State Bar Association Proceedings* (1917), 376 ff. For a trenchant criticism of the bicameral system in Kansas, see G. H. Hodges, "Distrust of State Legislatures," printed in J. T. Young, *The New American Government and its Work* (1913), 647-649.

any negative vote. Deadlocks and friction between the two houses would cease when two houses no longer existed, and the cost of supporting the legislature would be greatly diminished. At all events, it is believed that better results would be obtained with the same expenditure if the membership of the legislature were reduced to not more than fifty and the members were paid salaries sufficient to compensate men of large caliber for the sacrifices which service in the legislature always entails for the successful professional or business man.

Movement  
for single-  
chambered  
legislatures

That the movement for the abandonment of the bicameral system in this country has passed beyond the stage of merely academic interest appears from the following facts. In messages to legislatures or in public addresses, the governors of Arizona, Washington, and Kansas, in 1913, and of South Dakota in 1926, recommended constitutional amendments for a one-house legislature.<sup>1</sup> Such amendments have actually been submitted to a popular vote in Oregon, Oklahoma, and Arizona; and although in every case they failed, the size of the vote in their favor is significant when one considers the deep-seated traditions, interests, and prejudices which are bound up with the bicameral system. In Oregon, in 1912, the proposed amendment received over 30,000 votes, although more than 71,000 were cast against it; in 1914, a similar proposal received 62,376 votes, when 123,429 were cast against it. In Oklahoma, in 1914, the amendment received 199,686 favorable votes, against 71,742 in opposition.<sup>2</sup> In Arizona, in 1916, it received 11,631 votes, to 22,286 in opposition.

Even state legislators themselves have begun to recognize the clumsiness, ineffectiveness, and other defects of the bicameral system. In Nebraska, a joint legislative committee made a report (1913) recommending that in 1916 a constitutional amendment be submitted providing for a legislature of one house. The proposal received the support of a majority in the 1915 session, but not enough votes to submit it to the electorate. In the constitutional convention of 1919-20, a resolution for the separate submission of a unicameral proposition was defeated only by a tie vote. In the California legislature of 1914, a proposed constitutional amendment, originating with the Commonwealth Club of San

<sup>1</sup> *Amer. Polit. Sci. Rev.*, IX, 316-317 (May, 1915); *ibid.*, XXI, 100, n. 20 (Feb., 1927). See also W. F. Dodd, *State Government* (2nd ed., 1928), pp. 141-147.

<sup>2</sup> It did not, however, prevail, because it received less than a majority of all the votes cast at the election.

Francisco and providing for a single legislative body of only forty members, passed the lower house by a vote of 37 to 30, and the senate by a vote of 19 to 15. This, however, lacked five votes of being a majority of the entire legislature, and therefore the proposal was not referred to the people. In other legislatures, including those of Alabama and South Dakota, and among many public officers, there have been indications of a consciousness that the bicameral legislature has little or no place in a genuinely democratic and effective scheme of state government.<sup>1</sup>

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Changes in the size, as well as in the structure, of most of our state legislatures would also contribute to their increased effectiveness, and would reduce the ease with which responsibility for legislative action or inaction may now be avoided. For purposes of deliberation, the senates are, in most of the states, more nearly of ideal size than are the lower houses. Senates range in membership from seventeen in Delaware, eighteen in Utah, and nineteen in Arizona, up to fifty-one in New York and Illinois and sixty-seven in Minnesota, the last-mentioned numbers being rather larger than is desirable. The lower houses, on the other hand, are generally so large as to be ill-adapted for purposes of general discussion, with the result that great power in determining both the form and the substance of legislation has perforce to be lodged in irresponsible committees. Arizona and Delaware have lower houses of suitable size for deliberation, consisting of thirty-five members in each case. At the other extreme stand Vermont, Connecticut, and New Hampshire, with lower houses consisting of 247, 268, and 421 members, respectively. More than half of the states have lower houses of over one hundred members.

Size of the  
houses

Our legislatures have been made needlessly large and unwieldy in an effort to give them a broadly representative basis, it being mistakenly supposed that there is a direct connection between the size of a body and its representative character. If the people are sufficiently represented in the lower branch of Congress under a

A prevalent misconception of representation

<sup>1</sup> The New York Bureau of Municipal Research and the National Institute for Public Administration, after surveying the state agencies in Nevada (1924) and New Jersey (1929), respectively, recommended a single-chambered legislature. *Nevada State Journal*, Nov. 20, 1924, cited in *Nat. Mun. Rev.*, XIV, 679 (Nov., 1925); *Report on a Survey of the Organization and Administration of the State Government of New Jersey*. . . . (1930). The legislative committee of the Citizens' League of Cleveland, in reporting upon the work of the Ohio legislature of 1927, expressed the belief that the adoption of a single-house legislature "is a subject which should be given the most serious thought by the people of the state before the next constitutional convention is called in 1932." *Greater Cleveland*, II, 182 (June 15, 1927).

system which gives but one representative to upwards of three hundred thousand inhabitants, it would seem that our state legislatures would not suffer in their representative character by a considerable reduction in size; municipal councils in numerous cities have been reduced to nine, five, or even three, members, without impairing their representative character. Even a single public official—the president, a governor, or a mayor—often more truly represents public opinion than Congress, a legislature, or a city council.

The size of the two houses is determined in different ways in different states. The constitution usually lays down some general rule or principle to guide the legislature in apportioning representatives and senators among the various political subdivisions. In fewer than a dozen states, including Illinois and California, the constitution fixes the exact number of members in each house, a plan which has the advantage of preventing an almost certain increase in the size of the legislature with every reapportionment, such as has frequently taken place in the history of Congress. At the same time, this method has the disadvantage of reducing periodically, both proportionally and absolutely, the representation from the slower-growing sections of the state if reapportionment acts are passed every five or ten years. On the other hand, if such acts are not passed at stated intervals, the effect is to reduce proportionally the representation from the more rapidly growing communities. But in most states the constitution leaves the size of the two houses undetermined, and in such cases the legislature may, within broad limits, make whatever arrangements it desires.

In establishing units of representation in the legislature, state constitutions and statutes follow no uniform rule. When the oldest states were formed, representation was based upon territorial units; towns and counties were usually accorded a substantially equal number of representatives; and no grave injustice resulted so long as no great differences in population existed. As some towns or counties outstripped others in population, however, glaring inequalities of representation developed, some of which still exist. To remedy this situation, many states have adopted equal units of population as the basis of representation in one or both houses, or in other ways have given increased recognition to populous communities. As a result, we frequently find an intermingling of territorial and population units in the same state. The situation to-day will appear more clearly if we review briefly the bases of representation in each branch of the legislature separately.

Towns in New England and counties in most of the other states form the chief units of representation in the lower house; and when differences in size are not provided for, gross inequalities in representation and a series of "rotten boroughs" result. This is especially true of Vermont, Connecticut, and Rhode Island. In Vermont, every town, regardless of size, is permitted one, and only one, representative. In Connecticut, every town has one representative, and towns with more than five thousand people have only two. In Rhode Island, each town is entitled to at least one member, and no place may have more than one-fourth of the total number of representatives. New Hampshire and Maine have given more recognition to populous towns. In New Hampshire, each town with more than six hundred inhabitants has at least one representative; towns with less than that number are represented in some sessions of the legislature and not in others. In Maine, each town with 1,500 inhabitants may elect one representative; larger towns may elect from two to seven; and the smallest towns are grouped into classes having fifteen hundred population, each class electing one representative.<sup>1</sup> In Massachusetts, on the other hand, towns, as such, are not represented.

In most states outside of New England, the county is used in one way or another as the basis of representation. Where every county is entitled to one representative, larger counties are usually given representation in proportion to population.<sup>2</sup> In New York, every county except one (Hamilton) is given at least one representative. A similar system exists in Pennsylvania, New Jersey, Ohio, Iowa, and most of the southern states. In about a dozen states, however, small counties are combined, and large ones are subdivided, into legislative districts of substantially equal population, as in Massachusetts, Illinois, and California, where each district elects the same number of representatives.

Turning to the state senates, we find that territorial areas are sometimes, though not commonly, given equal representation. The county is the unit of senatorial representation most generally em-

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1. In the  
lower  
house

2. In the  
Senate

<sup>1</sup> For additional facts about the New England system of representation, see C. L. Jones, "The Rotten Boroughs of New England," *No. Amer. Rev.*, CXCVII, 486-498 (Apr., 1913); H. E. Deming, "Town Rule in Connecticut," *Polit. Sci. Quar.*, IV, 401-432 (Sept., 1889); G. S. Ford, "Rural Domination of Cities in Connecticut," *Municipal Affairs*, VI, 220-233 (June, 1902); L. W. Lancaster, "Rotten Boroughs and the Connecticut Legislature," *Nat. Mun. Rev.*, XIII, 678-683 (Dec., 1924).

<sup>2</sup> Sometimes, however, a restriction is set up whereby no one county is permitted to elect more than a certain number or proportion of the members of the house.



played; and most states give some recognition to differences in county population, although restrictions are frequently placed upon the number of senators permitted to the most populous counties. In a number of states, however, counties are grouped or subdivided into senatorial districts of substantially equal population, each electing the same number of senators.<sup>1</sup> Some interesting departures from these general rules may be noted. In Vermont, each county has from one to four senators, according to population. New Hampshire has the unique system of allotting one senator to each of the twenty-four districts into which the state is divided according to the proportion of direct taxes paid. Rhode Island has long been noted for its rotten borough system, which gave each town one senator only; thus, West Greenwich, with five hundred inhabitants, had the same senatorial representation as Providence, with 250,000 people. A recent constitutional amendment (1928) now permits Providence to elect four senators. A similar disparity of representation exists in New Jersey, South Carolina, and Montana, where each county, regardless of size, has one senator; and also in California, where a slightly different arrangement exists. In that state, thirty-one counties of small population are grouped into thirteen senatorial districts; each of the remaining twenty-seven counties, although differing greatly in population, forms a single district; and no district has more than one senator.<sup>2</sup>

In a few states, notably Illinois, Minnesota, and North Dakota, there is but one series of districts for the election of members of the two branches of the legislature, a plan which has the advantage of permitting the development of some fairly permanent community interests in legislative representation within particular areas.<sup>3</sup> But as a rule the senatorial districts are different from, and larger than, the assembly districts. It is not always the *total* population, however, that is taken as the basis of representation. Oregon, for example, reckons only the white population; Arkansas and Indiana count only the adult male inhabitants; Maine, New York, and North Carolina exclude unnaturalized aliens, and California excludes aliens who are not eligible to become citizens; Massachusetts

<sup>1</sup> For example, in Maine, Massachusetts, Connecticut, Illinois, Minnesota, North Dakota, and Missouri.

<sup>2</sup> See F. N. Ahl, "Reapportionment in California," *Amer. Polit. Sci. Rev.*, XXII, 977-980 (Nov., 1928).

<sup>3</sup> Further details may be found in *Ill. Const. Conv. Bull.*, No. 1 (1920), "The Legislative Department"; A. N. Holcombe, *State Government in the United States*, Chap. IX; and W. F. Dodd, *State Government* (2nd ed.), Chap. VI.

and Tennessee base representation upon the number of qualified or legal voters.<sup>1</sup>

Whatever the basis of representation, the districts are almost always laid out by the legislature; and where population is the sole basis, a number of constitutions definitely make it the legislature's duty to re-district the state after each decennial federal census, or oftener, in order to keep the districts substantially equal in population, thus giving a person's vote as much weight in one part of the state as in another. Unfortunately, there appears to be no way in which the performance of this duty can be enforced by the courts when the legislature refuses or neglects to carry out the constitutional mandate.<sup>2</sup> Provisions designed to prevent or counteract any such legislative nullification of the constitution are found in very few states—Ohio, for example, where the governor, auditor, and secretary of state, or any two of them, are empowered to mark out legislative districts in accordance with definite rules set down in the constitution.<sup>3</sup> In Maryland, similar power is vested in the governor; and in California, in the lieutenant-governor, the attorney-general, the secretary of state, and the state superintendent of public instruction, acting as a reapportionment commission.

But even where the legislatures live up to the constitution and periodically re-district the state, they do not always act with scrupulous fairness. It not infrequently happens that the dominant party in the legislature indulges in the partisan practice of gerrymandering the state. That is to say, the districts are so marked out as to give that party a fairly safe majority or plurality in as many districts as possible, while the voters of the chief minority

Gerrymandering

<sup>1</sup> In Texas, this last rule is applied only to the senate.

<sup>2</sup> In Illinois, the legislature has failed to obey the constitutional requirements since 1901. If the constitutional rule were observed, Cook county would have been entitled, in 1920, to four additional senators and twelve additional representatives. To grant this increased representation, however, would mean a corresponding reduction of representation from other parts of the state, and hence reapportionment acts have been defeated repeatedly by the members from those sections. In 1925, a private citizen brought action in the state supreme court praying for a mandamus to compel the legislature to pass a reapportionment act; but the court held that it could exercise no such power. *Fergus v. Marks*, 152 N. E. 557 (1926). For further details on the unfortunate situation in Illinois, see C. M. Kneier, "Chicago Threatens to Revolt," *Nat. Mun. Rev.*, XIV, 600-603 (Oct., 1925); *Amer. Polit. Sci. Rev.*, XXI, 573-576 (Aug., 1927); R. L. Mott, "Reapportionment in Illinois," *ibid.*, XXI, 598-602 (Aug., 1927).

<sup>3</sup> A like provision (no longer in force) was invoked in Missouri in April, 1921, and was also included in the proposed Illinois constitution of 1922. See J. M. Mathews, *American State Government*, p. 155, n. 10.

party are crowded into as few districts as possible, where they will be in an overwhelming majority. This practice, of course, seriously impairs the representative character of the legislature, for it usually deprives minority parties in most districts of any direct representation in the body which formulates public policy for the entire state. To check this propensity on the part of legislatures, and to limit in other respects their discretion in laying out legislative districts, stringent provisions controlling the apportionment of representation appear in the constitutions of many states. In Illinois, for example, a definite rule is laid down to the effect that the senatorial districts, which are the bases of representation in both houses, shall be formed of contiguous and compact territory, bounded by county lines, and shall contain as nearly as possible an equal number of inhabitants. In some states, notably Wisconsin, Michigan, and Indiana, the courts have been very strict in construing such constitutional limitations and have declared apportionment acts invalid which, in the opinion of the court, did not sufficiently comply with the constitutional requirements. On the other hand, the courts of New York, Illinois, and Kansas have been disinclined to invalidate apportionment acts unless the constitutional requirements appear to have been wholly disregarded.<sup>1</sup>

Discrim-  
ination  
against  
urban com-  
munities

Another feature of legislative representation is the frequent discrimination in one or both branches in favor of rural counties against large urban centers, especially in Illinois, Maryland, Missouri, Michigan, New Jersey, New York, Pennsylvania, and Rhode Island. New York City has about fifty-five per cent of the total population of the state, but is allowed only forty-two per cent (63 out of a total of 150) of the seats in the assembly, or lower house; Baltimore, with nearly half the population of Maryland, has thirty-six out of 118 members of the lower house and six out of twenty-nine senators; Providence, with more than a third of the people of Rhode Island, has only twenty-five representatives out of one hundred, and four senators out of thirty-nine; Chicago, with almost one-half of the population of Illinois, is accorded, under existing arrangements, only about thirty-seven per cent of the members of either house;<sup>2</sup> and Wayne county (Detroit) has over one-third of

<sup>1</sup> P. S. Reinsch, *American Legislatures and Legislative Methods*, 200-213.

<sup>2</sup> J. M. Mathews, "Municipal Representation in Legislatures," *Nat. Mun. Rev.*, XII, 135-141 (Mar., 1923); O. A. Welsh, "American Rotten Boroughs," *Survey*, LII, 509-513 (Aug. 1, 1924), summarized in *Literary Digest*, LXXXII, Sept. 6, 1924, pp. 14-15; *idem*, "Government by Yokel," *Amer. Mercury*, III, 199-205 (Oct., 1924); *idem*, "Progressive Hopes and Rotten Boroughs," *Na-*

the population of Michigan, but only five out of thirty-two senators and fourteen out of one hundred members of the house. This sort of discrimination is not always directed against a single populous city; it frequently happens that the urban districts, taken as a whole, are greatly under-represented in the legislature in comparison with the rural sections. This is especially apt to be the case when every county (or town), irrespective of size, is granted at least one member.

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In justification of these and similar discriminations, one often hears it said that cities, being industrial centers, are hotbeds of radicalism, while conservatism is found chiefly in agricultural communities; and therefore, in order to check radicalism, the agricultural areas should be given greater proportional representation in the legislature. Besides, there is a prevalent feeling among practically all classes in the less thickly settled portions of the states that no one county or city should be able to control the legislature, a thing which might easily happen if all portions of the state were represented on a strict population basis. Naturally, this feeling has been capitalized by politicians from the rural districts, who, fearing the domination of the state government by the "city crowd," with consequent diminution of their own influence and prestige, seek to check in every possible way the granting of strictly proportioned representation to the urban centers. The discrimination against cities in Delaware and Rhode Island goes far to explain the opposition in the legislatures of those states to all political changes designed to increase the power of the popular majority. For example, direct primaries are opposed in those states because the abandonment of the convention system of making nominations would mean the end of the control of such nominations by the rural districts. The initiative and referendum are similarly objected to because they would tend to weaken rural control of the legislatures.<sup>1</sup>

Reasons  
for such  
discrim-  
ination

On the other hand, it is argued that to deprive one section of the state of its proportionate representation in the legislature is to violate a fundamental principle of American democracy by sub-

Objections  
to it

tion, CXX, 12-14 (Jan. 7, 1925); V. J. West, "California—the Home of the Split Session," *Nat. Mun. Rev.*, XII, 370-372 (July, 1923); F. R. Aumann, "Rotten Borough Representation in Ohio," *ibid.*, XX, 82-86 (Feb., 1931); S. O. Blythe, "Shall City or Country Rule?," *Country Gentleman*, XCII, 6-7 (Mar., 1927), on the California apportionment legislation of 1927; A. C. Miller, "Curbing a Metropolis in a Constitution," *Amer. Bar. Assoc. Jour.*, VII, 17-19 (Jan., 1921).

<sup>1</sup> A. N. Holcombe, *State Government in the United States* (1926), 255, note.

stituting minority rule for majority rule; that the trend of American constitutional development from the colonial period to the present has been away from the territorial basis of representation to a population basis, and that such discriminations as remain are merely vestigial appendages; and that those who attempt to justify discriminations on the basis of a distinction between radicalism and conservatism either are ignorant of, or disregard, the fact that some of the most conspicuous of radical movements in American history—the granger movement, greenbackism, populism, free-silverism, and the more recent Non-Partisan League movement—have had their origin and found their largest number of adherents in the distinctively agricultural sections of the country. As a matter of fact, neither the urban nor the rural sections of the country can justly be charged with being the exclusive habitat of either radicalism or conservatism. Moreover, it should be remembered that the radicalism of yesterday is apt to become the conservatism of to-morrow; and that to check unduly what is regarded by some people as radical to-day may prove a serious bar to the progress of the state in years to come.

Legislatures are fairly representative of social and economic groups

Despite oft-expressed opinions to the contrary, our state legislatures are probably fairly representative of the different social and economic groups contained in the states.<sup>1</sup> Every degree of education is found, and in some legislatures the proportion of members who have had a high school, college, or university education is at times considerably greater than that prevailing among the people generally. Almost every profession is represented, and almost every conceivable business activity, although lawyers and farmers usually outnumber the members of other vocations. "With the farmer sits the artisan, with the banker sits the union labor agitator, with the manufacturer sits the small shopkeeper, with the preacher sits the saloon-keeper, with the professional specialist sits the jack-of-all-trades."

The majority are men in the prime of life, between forty and sixty years of age; although now and then a young man barely a voter, or an octogenarian, appears. Every phase and degree of

<sup>1</sup> An interesting study of the personnel of the legislatures of Ohio, Vermont, Indiana, and Missouri some years ago is to be found in S. P. Orth, "Our State Legislatures," *Atlantic Monthly*, XCIV, 728-739 (Dec., 1904), reprinted in P. S. Reinsch, *Readings on American State Government*, 41-56. See also R. Luce, *Legislative Assemblies*, Chaps. XIV-XV; S. A. Rice, "The Behavior of Legislative Groups," *Polit. Sci. Quar.*, XL, 60-72 (Mar., 1925); and J. C. Jones, "The Make-up of a State Legislature [Kentucky]," *Amer. Polit. Sci. Rev.*, XXV, 116-119 (Feb., 1931).

political experience is also represented: "those who have been only voters, those who make politics a business; those who are ardent partisans, and those who are politically torpid; the conservative and the demagogue—all are intermingled in these representative bodies."<sup>1</sup> Even foreign-born citizens are well represented.<sup>2</sup> And since the adoption of national woman suffrage, women legislators have appeared in increasing numbers. In the elections of 1930, at least nine women were elected to state senates and 138 to membership in lower houses; and only five states were without women legislators.

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It cannot be said, however, that all currents of political opinion find representation in our legislative bodies. This defect is due mainly to the fact that, with few exceptions,<sup>3</sup> both senators and members of the lower house are chosen in small, single-member districts; and the candidate who obtains a simple plurality of the popular vote, however small, wins.<sup>4</sup> This means that large minorities—even majorities, when the votes are divided among the candidates of three or more parties—are left with no spokesman in either house. A remedy for this condition would be some scheme of comparatively large electoral districts, each returning not less than three or five representatives, all elected under an arrangement which will yield each considerable political element representation in fair proportion to its voting strength. This principle of "propor-

But not of  
various  
currents of  
political  
opinion

<sup>1</sup> Orth, *op. cit.* In the Illinois house in 1923 there were 45 lawyers, 18 farmers, 14 real estate men, 12 merchants, 18 insurance, or real estate and insurance, men, 6 clerks, 3 bankers, 2 contractors, 2 grain merchants, 2 publishers, 2 manufacturers; and each of the following occupations had one representative: automobile, barber, broker, bonds and bonding, coal trade, clergy, deputy sheriff, director of amusement company, deputy coroner, hotel proprietor, home-maker, insurance, oil and lumber, iron and steel, journalism, jeweler, lather, lumber, coal and grain, miner, musician and merchant, master painter, motor service, printer, physician and surgeon, retail lumber and manufacturing, "retired," teacher, teaming, undertaker, wholesale hay. The senate consisted of 22 attorneys, 5 farmers, 3 manufacturers, 2 accountants, 2 bankers, 2 druggists, 2 merchants, 2 real estate men, and one auctioneer, cabinet-maker, clerk, contractor, journalist, insurance broker, lecturer, miner, physician, salesman, and superintendent. For the occupations represented in the Oregon legislature of 1923 and the Texas legislature of 1921, see *Nat. Mun. Rev.*, XII, 536 (Sept., 1923); *ibid.*, XII, 654 (Nov., 1923).

<sup>2</sup> The New Mexico legislature in 1923 appropriated nearly \$2,000 to pay translators and interpreters to enable "native" members of the lower house to read bills and debate measures in Spanish. F. Strother, "The Immigration Peril," *World's Work*, XLVI, 632-637 (Oct., 1923).

<sup>3</sup> In Ohio, when a county is entitled to more than one senator or representative the entire number is elected at large. A similar rule prevails in Wyoming. On the unique Illinois system, see J. M. Mathews, *American State Government*, 187-168.

<sup>4</sup> In Vermont, an absolute majority of all votes is required to elect. This often results in prolonged balloting, extending over several days.

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representation  
as a  
remedy1. The Hare  
system

tional representation" has already been adopted in Switzerland, Belgium, Denmark, Sweden, the German republic, Czechoslovakia, Austria, and some parts of the British self-governing dominions;<sup>1</sup> and it is receiving steadily increasing attention in the United States, where a few municipalities have brought it into operation.

As now practiced, proportional representation takes two principal forms. One of them, called the Hare system—a combination of preferential voting and proportional representation—has been adopted for the election of members of the city council in Ashtabula (1915-1929), Cleveland, Cincinnati and Hamilton (O.), Boulder (Col.), Kalamazoo (Mich.), Sacramento (Cal.), and a few Canadian cities.<sup>2</sup> In 1920, however, the Michigan supreme court declared the proportional representation feature of the Kalamazoo charter unconstitutional; and in 1922 the Sacramento charter provision was similarly invalidated by a California court decision.<sup>3</sup> The other plan is called the list system. If either were to be generally adopted for the election of members of the state legislatures, the present small single-member districts would give way to fewer large districts, each electing perhaps from five to ten representatives. Under the Hare system, each voter indicates on the ballot the order of his preference among the various candidates whose names appear thereon. This mere preferential-voting arrangement is now in use in more than fifty cities in this country for the election

<sup>1</sup> F. A. Ogg, *The Governments of Europe* (rev. ed.), 421-422. The best books on proportional representation are J. R. Commons, *Proportional Representation* (2nd ed., New York, 1907), J. H. Humphreys, *Proportional Representation* (London, 1911), and C. G. Hoag and G. H. Hallett, Jr., *Proportional Representation* (New York, 1926). The files of the *Proportional Representation Review*, the organ of the American Proportional Representation League, contain lucid expositions of the different forms which the system takes. For criticisms of proportional representation, see G. Horwill, *Proportional Representation; its Dangers and Defects* (London, 1925); H. G. James, "Proportional Representation—A Fundamental or a Fad?," *Nat. Mun. Rev.*, V, 266-272 (Apr., 1916).

<sup>2</sup> Articles describing the workings of the Hare system in American cities may be found in *Nat. Mun. Rev.*, V, 56-65 (Jan., 1916); V, 87-90 (Jan., 1917); VII, 27-35 (Jan., 1918); VII, 339-348 (July, 1918); IX, 9-12 (Jan., 1920); IX, 84-92 (Feb., 1920); IX, 408-410 (July, 1920); X, 411-413 (Aug., 1921); XIII, 72-77 (Jan., 1924); XIV, 589-594 (Oct., 1925); XV, 651-660 (Nov., 1926); XIX, Supplement, 335-383 (May, 1930); *Amer. Polit. Sci. Rev.*, XXIV, 699-710 (Aug., 1930); *Polit. Sci. Quar.*, XXXVIII, 652-659 (Dec., 1923). This system was also used in the city of Winnipeg for the election of ten members to the provincial parliament of Manitoba in 1920. Its operation in that election is described by O. E. McGillicuddy in *New Republic*, XXIII, 44-45 (Sept. 8, 1920), and by D. B. Harkness in *Nat. Mun. Rev.*, IX, 695-696 (Nov., 1920). For additional references, see below, p. 870, n. 2.

<sup>3</sup> See W. Anderson, "The Constitutionality of Proportional Representation," *Nat. Mun. Rev.*, Supp., XII, 745-762 (Dec., 1923).

of city officials. The proportional feature appears in the method of determining the result of the election, and it is employed in only four American cities. Where employed, after all the ballots have been sorted according to the indicated first preferences, the total number of valid ballots is divided by the number of seats to be filled plus one, and the quotient becomes the electoral quota which each candidate must receive in order to be elected. Any candidates who are found to have received a number of votes equal to the electoral quota are declared elected. If any of these candidates receive votes in excess of the quota, these votes are distributed among the remaining candidates in accordance with the second choices indicated on the surplus ballots. If, with these additions to his first-choice votes, any candidate obtains a number equal to the quota, he is declared elected, any surplus votes again being distributed among the remaining candidates in accordance with indicated second choices. If no one should receive the quota as a result of distributing the surplus votes, the candidate standing lowest is eliminated, and his ballots are distributed among the other candidates in accordance with indicated second choices. This process of distributing surplus votes and eliminating candidates with the smallest votes in successive countings is continued until as many candidates obtain the required quota as there are places to be filled. If, however, a point is reached where there are no more candidates left than there are seats to be filled, the surviving candidates are declared elected, even though some of them fall short of the electoral quota.<sup>1</sup>

The list system would undoubtedly appeal more strongly to practical politicians in our country, inasmuch as under it parties are enabled to play a larger rôle in determining the result of an election. Under this plan, which, with some variations, is now in operation in Belgium, Germany, Austria, and several other countries, each organized group of voters nominates a "ticket," or list of candidates, usually equal in number to the number of representatives to which the district is entitled. The number of seats obtained by each party is determined by the proportion which the number of votes cast for each party ticket bears to the total number of votes cast in the district. The order in which the names in each list appear on the ballot affects the result and is determined

2. The list  
system

<sup>1</sup> The National Municipal Leagues "Model State Constitution" (1921) provides for the election of the legislature by the Hare system of proportional representation (§ 13).



by the party managers; unless the voters indicate a different preference, that order is followed in the assignment of the seats to which each ticket is entitled. If, however, a ticket should be entitled to four representatives, and a candidate whose name stood sixth on the list as made up by the party leaders should receive more votes than one of the first four, he would be declared elected in place of the lowest candidate among the first four.

The actual operation of the list system in perhaps its simplest form may be illustrated by the following hypothetical case. Assume that a state has been divided into half a dozen large districts, in each of which ten representatives are to be elected; that five parties are competing for these seats; and that the total vote cast in a given district is 100,000. The first thing to do is to ascertain the electoral quota. This is done by dividing the total vote received by each ticket or list successively as follows:

	Republican	Democrat	Socialist	Farmer-Labor	Prohibitionist
Divide by 1.....	30,000	25,000	20,000	15,000	10,000
Divide by 2.....	15,000	12,500	10,000	7,500	5,000
Divide by 3.....	10,000	8,333	6,666	5,000	3,333

Next, the ten highest quotients thus obtained are arranged in order, beginning with the highest; and the tenth quotient, 8,333, becomes the electoral quota, or the number of votes which each ticket must have in order to be entitled to one representative. Dividing the total vote cast for the Republican ticket by 8,333 gives three, the number of representatives to which that party is entitled; and the first three names on the Republican list would ordinarily be declared elected. Applying the same method to the votes cast for other party tickets, we obtain, as the final result, the election of three Republicans, three Democrats, two Socialists, one Farmer-Laborite, and one Prohibitionist.

Advantages  
and dis-  
advantages

Each considerable group of voters in the district would thus receive representation in the law-making body in at least approximate proportion to its voting strength. On the other hand, the ordinary plurality system, such as we use in presidential and other elections, would have given the entire delegation to the Republicans. Proportional representation unquestionably produces a legislative body which more truly reflects all the important currents of political opinion than does the small, single-member district, electing under the plurality vote; and it hardly requires argument that a body whose main business is the translation of

public opinion into law ought to be of this broadly representative character. There are therefore, unmistakable theoretical merits in a system of proportional representation. Nevertheless, the supposed need or desirability of giving special representation to every considerable group or interest in the state can easily be over-emphasized. However desirable this may be in European countries with their racial minorities, in the United States direct representation of racial, religious, social, or economic groups can hardly be looked upon as an unmixed blessing. Moreover, one does not have to go far to discover evidence that a group or interest which is not directly represented in our state legislatures does not, on that account, become wholly inarticulate or devoid of political influence. Furthermore, if the system should tend to multiply political parties, as has happened in European countries, the result will hardly be greeted with enthusiasm. With our governors chosen independently of the legislature, the existence of numerous party groups would tend to create increased friction, if not positive antagonism, between the executive and legislative branches of the government.

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## CHAPTER XXXII

### THE LEGISLATURE: POWERS AND LIMITATIONS

From the state legislature, as from a great power-station, emanates the energy which sets in motion and drives most of the machinery, not only of the state government, but of the county, municipal, and other local governments as well. As has been pointed out, the legislature almost universally plays a leading part in the process of amending both the national and state constitutions; this, however, is only an occasional function, and accordingly one that may fairly be rated as of minor importance. The most conspicuous and far-reaching of the legislature's energizing powers run in other channels. The state constitution creates numerous executive and administrative offices and to some extent prescribes their functions; it establishes courts and to some extent defines their jurisdiction; it provides for certain organs of county and local government, and to some extent outlines their powers and duties. But the articles which relate to these several phases of state and local government are seldom self-executing; they usually require supplementary legislation. Administrative officials, for example, have little to do until the legislature enacts laws for them to administer; the courts cannot adjudicate the rights of individuals, save as these rights may be based upon the common law, until the legislature defines them; county, city, and other local government units are intimately dependent upon the legislature, and cannot function until that body has enacted numerous necessary laws.

The legislature as the central power-house of the state governmental system

The legislature completes the judicial and local organization of the state; regulates, wholly or in part, the jurisdiction and procedure of the various state and local courts; defines crimes and their punishment; determines, within certain limitations, the civil rights of citizens; regulates the ownership, use, and disposition of property, the making and enforcement of contracts, the conduct of professions and of many business and industrial enterprises, especially those carried on by corporations; enacts laws affecting the relations of husband and wife, and the other domestic relations; provides for a system of free public schools, and for charitable and penal insti-

Laws making constitutional provisions effective

tutions; regulates primaries, elections, and the organization and operations of political parties; passes acts which restrict rights of liberty and property in the interest of public health, morals, safety, and the general welfare; authorizes taxation for the support of state and local governments; appropriates definite sums to be expended by each department or activity of the state government; and authorizes the incurring of indebtedness by both state and local governments.<sup>1</sup>

No detailed  
enumeration  
of the  
powers of  
the legis-  
lature

This enumeration merely suggests the scope, variety, and importance of state legislative activities. Nevertheless, one may pore over one's state constitution from beginning to end without discovering any such list of legislative powers as that just given. For, in every state the legislature possesses all legislative power not granted elsewhere or prohibited to the states by the national constitution, and not expressly or impliedly withheld by the state constitution; and no comprehensive enumeration of its powers is ever attempted. One will, of course, come across clauses in almost every constitution which expressly confer certain specific powers on the legislature; and these direct grants of authority are, as a rule, not merely superfluous. In many instances they have become necessary in order to offset the effect of court decisions in interpreting certain general phrases in the constitution, such as "due process of law;" and again they have been inserted as a precaution against a possible future judicial denial of power to the legislature in the matters with which they deal. Outside of cases of this kind, however, the powers of the legislature are seldom specified; as a part of the general powers of the state, they are residual and unenumerated.

The police  
power

One of the so-called residual and inherent powers possessed by our state legislatures deserves special emphasis, namely, the police power. This is the power that enables the legislature to pass laws

<sup>1</sup> In addition to strictly legislative functions, certain non-legislative functions are assigned to the legislature in every state. For example, the consent of the senate is required for the appointment of certain officers appointed by the governor, and sometimes for their removal as well; the judges of the highest state court, and sometimes of inferior courts, are chosen by the legislature in Vermont, Rhode Island, Virginia, and South Carolina; in about one-third of the states, judges of the state courts may be removed by a vote of the two houses of the legislature; impeachment proceedings originate in one branch of the legislature and are generally tried by the other, although judges of some of the highest courts may be added, as in New York; in some states, the legislature also appoints some of the county and town officers, and takes part in the appropriation of town and county funds; and in a number of states the legislature serves as a canvassing board in connection with the election of certain state officers.

for the protection of the public health, morals, and safety, or laws which are otherwise very clearly for the general welfare. In exercising this important power, the legislature may restrict the ordinary rights of liberty and property enjoyed by the individual in almost any manner and to almost any degree, so long as the Supreme Court of the United States is satisfied that such restrictions do not amount to a deprivation of life, liberty, or property without due process of law, which is prohibited by the Fourteenth Amendment. Statutes based upon the police power have multiplied in recent decades until they have become almost legion, and the end is not in sight. Only the briefest possible enumeration of such enactments can be presented here, but it may convey some idea of the comprehensiveness of the power under consideration. Until recently, all state laws regulating the manufacture and sale of intoxicating liquor were based on the police power. This is true to-day of laws regulating the manufacture, sale, and use of explosives, fire-works, and fire-arms. Laws for the suppression of lotteries, gambling, vice, and immoral entertainments are obviously designed to protect the public morals. Practically every state also has laws regulating various trades, industries, and professions; laws for the protection of fish and game, and for the conservation of other natural resources; pure food and drug laws; laws authorizing quarantine and other health regulations; laws regulating the services, charges, and sometimes the stock-issues, of public utility corporations. Another very important class of regulations enacted under the police power includes those requiring the owners of mines and manufacturing and mercantile establishments to provide suitable protection for the health and safety of their employees, and to grant them compensation when injured in their service. Closely related are laws which restrict hours of labor for women and children, and in certain occupations, for men as well. Lastly, under the police power the legislature is able to authorize cities and other municipal corporations to suppress nuisances, to enact health, building, zoning, billboard, traffic, and a multitude of other ordinances, as well as to provide in still further ways for the protection of the life and property of their inhabitants.<sup>1</sup>

Despite the fact that the legislature is an exceedingly important and useful organ in every state government, it is looked upon by

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Suspicious  
attitude  
toward  
legislatures

<sup>1</sup> T. R. Powell, "The Police Power in American Constitutional Law," *Jour. Compar. Legis.*, 3rd series, I, Pt. 3, 160-174 (Oct., 1919); A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, II, 706-710, "Police Power."

people generally as more or less of a necessary evil, which ought to be curbed and checked at every possible point; and constitution-makers have themselves commonly shared this view. Admittedly, the history of American state legislatures contains much to account for, if not to justify, the current notion that they are inefficient and untrustworthy bodies; and practically every constitution adopted since the early nineteenth century has testified, in the number and variety of the restrictions imposed upon the legislature's activities, to the unfortunate experiences of the past. These restrictions have, in some instances, only aggravated the former difficulties; in others, they have even raised up new ones. Many such limitations have served their purpose, have outlived their usefulness; or else they are futile, either because of the ease with which they can be evaded or because they do not go to the root of the evils which they were designed to eradicate. For the sins of past generations of lawmakers, many unoffending legislatures are to-day so hobbled and shackled as not only to prevent them from doing serious harm, but also to make it impossible for them to accomplish the good which otherwise might result from their work.<sup>1</sup>

Absence of  
restrictions  
in earlier  
times

In the earliest state constitutions, practically no limitations were placed upon legislative activity other than those contained in the bill of rights; on the other hand, those documents furnish abundant evidence of the high popular esteem in which the legislature was then held. For example, in many states the legislature elected the governor, other important executive officers, and also the judges of the courts. Furthermore, in only three states (New York, Massachusetts, and South Carolina) was a veto upon legislation conferred upon the governor or some other authority. In the state constitutions of to-day, these conditions are almost completely reversed everywhere outside of New England, where, with the exception of a few restrictions on financial powers and some general directions to provide for education and the militia, the legislatures retain almost all of their early freedom. In the newer constitutions, especially in the West and South, one finds, in addition to the provisions of the bill of rights guaranteeing fundamental personal

Indirect  
restrictions

<sup>1</sup> Most of the express restrictions upon the states found in the national constitution (Article I, § 10 and the Fourteenth Amendment), together with the implied limitations on the power of the states over foreign and interstate commerce and bankruptcy, are, in practical operation, primarily restrictions upon the state legislatures. See pp. 124-128 above; also W. F. Dodd, *State Government* (2nd ed., 1928), Chap. v; J. D. Barnett, "The Delegation of Legislative Power to the States," *Amer. Polit. Sci. Rev.*, II, 347-377 (May, 1908).

and property rights against legislative impairment, an impressive array of specific limitations on legislative activity. A veto on legislation has also been given to the governor in every state except North Carolina; and in a few states the veto may be applied to a part, or to parts, as well as to the whole, of any legislative measure.

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Other limitations are to be found in constitutional provisions which specify the number, method of selection, duties, and powers of important state and county officers—provisions which sometimes go so far as to fix salaries and frequently prescribe the method of compensation and the length of the term of office. Such matters are thereby placed almost entirely beyond the power of the legislature to change; whence it comes about that short-ballot reform through legislative action alone is usually made totally impossible. Similarly, the amplification of state constitutions by the inclusion of detailed provisions relating to a large number of subjects over which the legislature at one time had jurisdiction removes those subjects, at least in part, from the sphere of legitimate legislative action; it so removes them altogether in states where the courts have most fully applied the doctrine of implied or resulting limitations.

Most state courts take the view that *every* provision of a state constitution should be construed as limiting legislative power to the greatest possible extent. The result in probably a majority of the states is that, whereas in theory the legislature has all legislative power not denied to it by the terms of the national and state constitutions, in practice it has tended to become a body having only strictly delegated powers, much like the municipal council described in a later chapter.<sup>1</sup> Few factors have contributed more to deaden popular interest in the work of the legislature, and to deprive the state of the services of its best qualified citizens, than this shriveling of legislative power through express constitutional restrictions, reinforced by narrow judicial canons of interpretation.<sup>2</sup> In some states, this doctrine of implied or resulting limitations has even been applied to *express grants* of power to the legislature, thus still further curtailing the power of that body when no such effect had been contemplated or intended by the constitution-makers. Nebraska

Narrow  
judicial  
construc-  
tion of  
restrictions

<sup>1</sup> See Chap. XLII below.

<sup>2</sup> For an excellent discussion of the powers of the state legislature as affected by judicial canons of construction, see *Ill. Const. Conv. Bull.*, No. 3 (1920), "The Legislative Department," 578-587; E. Freund, "The Problem of Adequate Legislative Power under State Constitutions," *Acad. of Polit. Sci. Proceedings*, V, 98-126 (1914); W. F. Dodd, "The Functions of a State Constitution," *Polit. Sci. Quar.*, XXX, 201-221 (July, 1915).



furnishes a conspicuous illustration of this sort of narrow constitutional interpretation. The Nebraska constitution of 1876 provides that the legislature shall have authority to establish reform schools for children *under sixteen years of age*; and the courts have construed this as restricting the legislature to the establishment of reform schools for such persons only, and as preventing it from establishing such schools for persons over the age mentioned.<sup>1</sup> This tendency on the part of the courts might to some extent be checked, remedied, or counteracted by formulating in the constitution itself a new rule of judicial construction which would at least make it easier for judges to adopt a more liberal view of legislative powers. The Oklahoma constitution of 1907, in point of fact, does seek to prevent the drawing of implied limitations from provisions not intended as such, by declaring that "the authority of the legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this constitution upon any subject whatsoever shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."<sup>2</sup>

Direct  
restrictions:

Most other constitutional limitations on the legislature relate to (1) financial powers, (2) the enactment of special, local, or private laws, (3) legislative procedure and the form in which bills must be enacted, (4) the frequency and length of legislative sessions, and (5) the use of the initiative and referendum.

1. Financial  
powers:  
(a) general

Among financial limitations, one finds sections requiring all taxation to be uniform upon all kinds of real and personal property according to valuation, or else permitting classification of different kinds of property and requiring that the rate of taxation shall be uniform within each class; clauses forbidding the legislature to exempt counties, or other local governments, from their share of the state taxes, or to exempt persons or corporations from taxation; clauses prohibiting the appropriation of money to private or sectarian schools, or to religious institutions, and excluding all other subjects from bills appropriating money for the payment of members and employees of the legislature and the salaries of state officers; sections limiting the period for which appropriations may be made, and prohibiting extra compensation to any public officer, agent, or contractor, or the payment of any claim against the state

<sup>1</sup> In 1920, a constitutional amendment raised this age limit to eighteen years.

<sup>2</sup> See in this connection Professor Freund's suggested remedy, in *Acad. of Polit. Sci. Proceedings*, V, 125 (1914).

not expressly authorized by law. All but three states (Connecticut, New Hampshire, and Vermont) prohibit the loan or pledge of state credit to private enterprises or to local governments, or to both; they also forbid the state to subscribe to the stock of private corporations, or to assume the liabilities of individuals, associations, or corporations (and of local governments as well, in about one-third of the states) unless these liabilities have been incurred in repelling invasion. Some constitutions specifically mention railroads, canals, and telegraph companies as coming within the foregoing inhibition.

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Especially important are the constitutional limitations on the power of the legislature to incur indebtedness.<sup>1</sup> These, as well as some of the restrictions just mentioned, have grown out of the reckless extravagance with which many legislatures, during the second quarter of the past century and in the Reconstruction period in the southern states, poured money into works of internal improvement, such as turnpikes, canals, and railroads, and also involved their states in the banking business.<sup>2</sup> Most states now permit legislatures to authorize loans in only comparatively small amounts, and only in order to meet casual deficits or temporary emergencies. The amounts thus permitted range from fifty thousand dollars in Maryland and Rhode Island to two millions in Idaho, the usual figure being five hundred thousand dollars or less. Furthermore, special conditions are sometimes imposed on borrowing; for example, the making of adequate provision by law for a tax to cover the interest and principal, or requiring repayment within a specified period, or making it necessary to obtain a two-thirds or three-fourths vote of all members of the legislature. Indebtedness in excess of the constitutional limit may be incurred in about one-third of the states, provided the action of the legislature authorizing the debt is approved in a popular referendum. Counties, cities, and other local governments in more than half of the states are similarly subject to constitutional debt limitations, and the legislature is therefore incapable of extending their borrowing powers.

(b) indebtedness

Maryland and New York have recently adopted constitutional amendments which materially restrict the freedom of the legislature in making appropriations. The budget of state expenditures is prepared by the governor, and is then submitted to the legislature, whose right to make changes in the governor's financial pro-

(c) appropriations

<sup>1</sup> See *Ill. Const. Conv. Bull.*, No. 4 (1920), "State and Local Taxation," 247-262, 288-303.

<sup>2</sup> For specific instances, see F. G. Bates and O. P. Field, *State Government*, 160-163.

gram has been sharply curtailed. In most states, however, the legislature has practically a free hand in appropriating the state's revenues.<sup>1</sup> Lastly, in all but nine of the states the governor has been given the right to veto, or to reduce, separate items in appropriation bills, as a further means of checking legislative extravagance. Inasmuch as the legislature is seldom able to overcome an executive veto or alteration, this device proves very effective.

Another class of restrictions has to do with "class legislation" and with local, special, or private laws, *i.e.*, laws which apply to, or are for the benefit of, some particular person, corporation, or locality, or which are not of general and uniform application throughout the state, or which do not apply to all persons or corporations included in some authorized classification. The control of special legislation is one of the most difficult problems that have confronted constitution-makers. Without some restriction, there is a wide field for favoritism and corruption; and much of the time of the legislature is likely to be frittered away in the consideration of petty matters.<sup>2</sup> As a result of the evils arising in many states from lack of restraints at this point, most constitutions now contain provisions which are designed to prevent special legislation, or at all events to restrict the number and variety of special or local laws that can be enacted. "For the present at least, constitutional limitations on special legislation are an important and growing part of our fundamental laws. Though they are admittedly subject to serious objections in theory, there can be no doubt that they have been a valuable protection under conditions which have heretofore surrounded the American legislature."

The most common ways in which state constitutions to-day deal with the problem of special legislation are (1) to prohibit special, local, or private laws on any matters and in all cases which can be

<sup>1</sup> For more details of the Maryland budget system, see H. S. Chase, "The Budget Amendment to the Maryland Constitution," *Nat. Mun. Rev.*, VI, 395-398 (May, 1917); and A. E. Buck, "Operation of the Maryland Budget," in *Amer. Polit. Sci. Rev.*, XII, 514-521 (Aug., 1918).

<sup>2</sup> In Illinois, between 1862 and 1870, "the private and special legislation evil grew to such proportions that practically the entire time of the General Assembly was devoted to the enactment of private and special laws, while measures of public interest were in many instances stifled or passed without due consideration." *Constitutional Conventions in Illinois* (Springfield, 1920), 21. At the present time, North Carolina probably furnishes the worst example of practically unrestricted legislative freedom in enacting local or special laws. See C. L. Jones, *Statute Law-Making in the United States*, 39-40; *Massachusetts Const. Conv. Bulletin* No. 34, "Special Legislation" (1918). Illustrations of special legislation relating to municipal government will be found in Chap. xli below, and *Nat. Mun. Rev.*, XIII, 45-46 (Jan., 1924).

covered by a general law;<sup>1</sup> (2) to require that all general laws, or laws of a public nature, be uniform in their operation throughout the state; and (3) to list, in the constitution itself, the subjects which may not be dealt with in special or local laws. Thus we find legislatures expressly forbidden to pass special laws granting divorces; changing the names of persons and places; laying out or altering highways; vacating roads, streets, and public grounds; locating or changing county seats; regulating county and township affairs; providing for changes of venue in civil and criminal cases; regulating the rate of interest on money; chartering or licensing ferries or toll-bridges; regulating elections; remitting fines, penalties, and forfeitures; changing the law of descent; granting or amending corporate charters; and granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise. In many instances these restrictions have had a very salutary effect; nevertheless, a great amount of special legislation continues to be enacted, for legislatures have found ingenious ways of evading them. The legislatures, however, are not wholly to blame; much special legislation is needed in order to deal satisfactorily with peculiar local problems; and much is enacted at the behest, and because of the importunities, of the people of some locality, or of representatives of some special interest.

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Ineffective-  
ness of  
these lim-  
itations

The growing complexity of legislative problems and the diversity of local needs seems, indeed, to warrant some relaxation in the rules restricting special legislation.<sup>2</sup> Unfortunately, no really effective mode of properly safeguarding the public interest, while at the same time permitting a reasonable degree of freedom of action to the legislature, has yet been devised. Perhaps a plan embodied in the Michigan constitution of 1908 comes nearest to being a satisfactory solution. Under it, the legislature is prohibited from passing any local or special act in any case where a general law can be made applicable; and whether a general act can be made applicable is for the courts to decide, rather than for the legislature itself, as is the practice in many states.<sup>3</sup> Furthermore, local or special laws must receive a two-thirds vote in both houses of the legislature, and

<sup>1</sup> Where the state courts hold that the legislature is the sole judge whether a given case can be covered in a general law, this kind of restriction has proved very ineffective.

<sup>2</sup> C. L. Jones, *Statute Law-Making*, 43; H. R. Trusler, "Hasty and Local Legislation," *Amer. Law Rev.*, LX, 362-373 (May-June, 1926).

<sup>3</sup> A similar restriction exists in Alabama, Kansas, Minnesota, and Missouri.

are not to take effect until approved by a majority of the electors voting thereon in the district to be affected.

The constitutional limitations relating to legislative procedure and to the form in which bills are passed are designed, for the most part, to guard against surprise, to secure reasonable deliberation and publicity, and to ensure, in some degree, a sense of responsibility on the part of the law-makers.<sup>1</sup> Among the restrictions belonging to this general class are clauses requiring (a) that all bills and their amendments be printed a certain number of days before final action is taken, although very often the rule is not observed in practice; (b) that every bill be read at large or at length on three different days, although where all bills have to be printed this serves no useful purpose, consumes a large amount of time if observed, and in actual practice is commonly disregarded; (c) that a ye and nay vote be taken on the passage of all measures, a rule which also is frequently disregarded in practice;<sup>2</sup> (d) that no act embrace more than one subject, which shall be clearly indicated in the title; and (e) that statutes be not amended or revived by reference merely, but rather that all portions amended or revived be included in full.

In Illinois, this last requirement, through judicial construction, has resulted in nullifying laws not expressly amending former acts but so altering the effect of a previous law that the two acts have had to be read together in order to find the law upon the subject. This rule—which has been followed by the state supreme court since 1900—gives the court the very great power of determining in each case whether an act is sufficiently independent of previous legislation to be upheld as an independent statute, or whether it so affects previous legislation as to amount to an amendment thereof, in which case the act comes within the constitutional requirement relating to amendments. "With the large mass of statutes in force at any given time, it is possible to hold that practically any new piece of legislation is amendatory of earlier legislation; and with no definite principles laid down for the guidance of the general assembly . . . the rule sets up practically a guessing contest between the general assembly and the supreme court in which the supreme

<sup>1</sup> P. S. Reinsch, *American Legislatures and Legislative Methods*, 134 ff.

<sup>2</sup> To save a large amount of time consumed in roll-calls for ye and nay votes, Wisconsin, Iowa, Virginia, Louisiana, and Texas have installed a system of electrical voting. See "A Machine Vote," *Literary Digest*, LIV, 1407 (May 12, 1917); and E. B. Rodriguez, "Electric Voting in the Wisconsin Legislature," *Nat. Mun. Rev.*, VIII, 404-405 (Aug., 1919).

court has the last guess." Such a result was, in all probability, neither foreseen nor intended by the framers of the Illinois constitution.<sup>1</sup>

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By reason of the foregoing, and numerous other, limitations directly or indirectly placed upon legislative procedure—some of which, as in Illinois, have been enlarged by judicial construction—pitfalls exist in almost every direction, and some of them may easily be overlooked in the most carefully planned legislation. Not without reason has legislation been characterized as a hazardous occupation.

In early days, it was customary to provide for annual elections and for annual sessions of the legislature, but at the present time legislators are elected every year only in New York and New Jersey; and only five states (Massachusetts, Rhode Island, New Jersey, New York, and South Carolina) <sup>2</sup> have annual legislative sessions. In forty-two states, sessions are biennial, with the provision that special sessions may be called at any time; in Alabama, the regular sessions are held quadrennially. About three-fourths of the states now limit, in one way or another, the period during which the legislature may sit. These periods vary from forty days in Wyoming to five months in Connecticut; the most common limit is sixty days or thereabouts, which is the rule in some twenty states. In a few other states there is no absolute limitation, but after the expiration of a certain period the legislators receive no pay, or their compensation is at a reduced sum per day.

4. Frequency and duration of legislative sessions

These restrictions arise from a desire to compel legislators to perform their work with despatch; also from a hope of reducing the quantity of poor legislation, and of saving the state from evils of over-legislation generally. It has been thought that, with less frequent sessions, subjects of major importance would absorb the interest of the legislators and tend to crowd out trivial matters or matters of merely personal or local interest; that, at all events, with the length of these sessions definitely limited, the amount of poor legislation would be proportionally reduced; and that, meeting more rarely, the legislature would attract greater public attention, and thus become a more inviting field of activity for men of ability. But extended experience with these limitations has clearly and repeatedly demonstrated their futility. When public opinion de-

<sup>1</sup> *Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department," 558.

<sup>2</sup> In 1924, Georgia voted to adopt biennial sessions.

mands legislation, and the time in which to enact it is definitely limited, the effort will be made to crowd it all into the allotted time. This practice goes far toward explaining the crude form and ill-digested character of many measures that get on the statute-books. Furthermore, on exceptionally controversial subjects the legislature is tempted to abdicate its responsibility by passing inadequately considered bills, leaving it to the governor to decide whether they shall become laws.<sup>1</sup> Indiana furnishes a good illustration in point. Legislative sessions are there limited to sixty-one days, including holidays and Sundays. The routine work of organization consumes some time, and only from forty to forty-five days are actually available for the consideration of bills. A former legislative reference librarian in that state,<sup>2</sup> describing the session of 1917, testifies as follows concerning the effects of this constitutional restriction:

"It is utterly impossible to do the work in sixty-one days. The best intentioned legislature in the world could not do the job in sixty-one days, even if it were not harassed by the job-hunters, peanut politicians, and self-serving lobbyists. To continue to try to do the work in sixty-one days is to continue to play directly into the hands of the people who profit by confusion. One hundred and fifty laws were dumped on the desk of the governor during the last two days of the session. Prior to that time, fewer than sixty had been sent to him. In the closing days, therefore, three-fourths of the legislation of the session was enacted, and in what horrible confusion! The last night of the session members could be found enrolling their own bills in any part of the capitol in order to get them signed by the presiding officer before adjournment. What a splendid chance to slip jokers into bills! What a splendid opportunity for the clever gentlemen who knew exactly what they wanted! In this confusion many good laws came through in such shape as to render them invalid."<sup>3</sup>

The wide adoption of the initiative and referendum in connection with ordinary state legislation furnishes another conspicuous illustration of the lack of popular confidence in representative law-making bodies. When these modes of "direct legislation" are employed, the final decision as to what shall or shall not become law (so far as the law-making process is concerned) is taken away

<sup>1</sup> C. L. Jones, *Statute Law-Making*, 13-14.

<sup>2</sup> Mr. John A. Lapp.

<sup>3</sup> See also R. Luce, *Legislative Assemblies*, Chap. VII.

from the legislature and reserved to the people or the electorate. In spite of frequent assertions to the contrary, the adoption of the initiative and referendum has nowhere in this country been due to any general desire to do away with our traditional representative legislative bodies and to substitute law-making directly by the electorate. It has always been assumed that the great mass of legislation would continue to be enacted by the legislature as formerly; and in practice this has proved to be the case.<sup>1</sup> The adoption of the initiative and referendum has meant simply that the electorate has deemed it necessary, in view of unfortunate experiences, to provide itself with additional checks upon the work of the legislature, whereby, if that body fails to enact laws that are needed or desirable, the people may obtain them by direct action under the initiative; or, when the legislature has enacted laws that meet popular disapproval, the electorate may veto them in a popular referendum. In other words, the initiative and referendum are not designed for frequent use, but rather to serve as "a gun behind the door;" if seldom called into play, the presumption is that the legislature is doing its work satisfactorily.

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South Dakota, in 1898, became the first state to adopt the initiative and referendum for ordinary legislation; and since that date nineteen other states have taken a similar step, the last one to do so being Massachusetts, in 1918. In addition to these states, Maryland and New Mexico have the referendum only. In Idaho, however, no law has been enacted to carry out the direct-legislation amendment adopted in 1912; and in Mississippi the amendment authorizing the initiative and referendum was declared invalid in 1922 by the state supreme court.<sup>2</sup> Hence, the system is actually in operation in only twenty states at the present time (1931). Elsewhere, however, the question of adopting it has been under dis-

Spread of  
the initia-  
tive and  
referendum

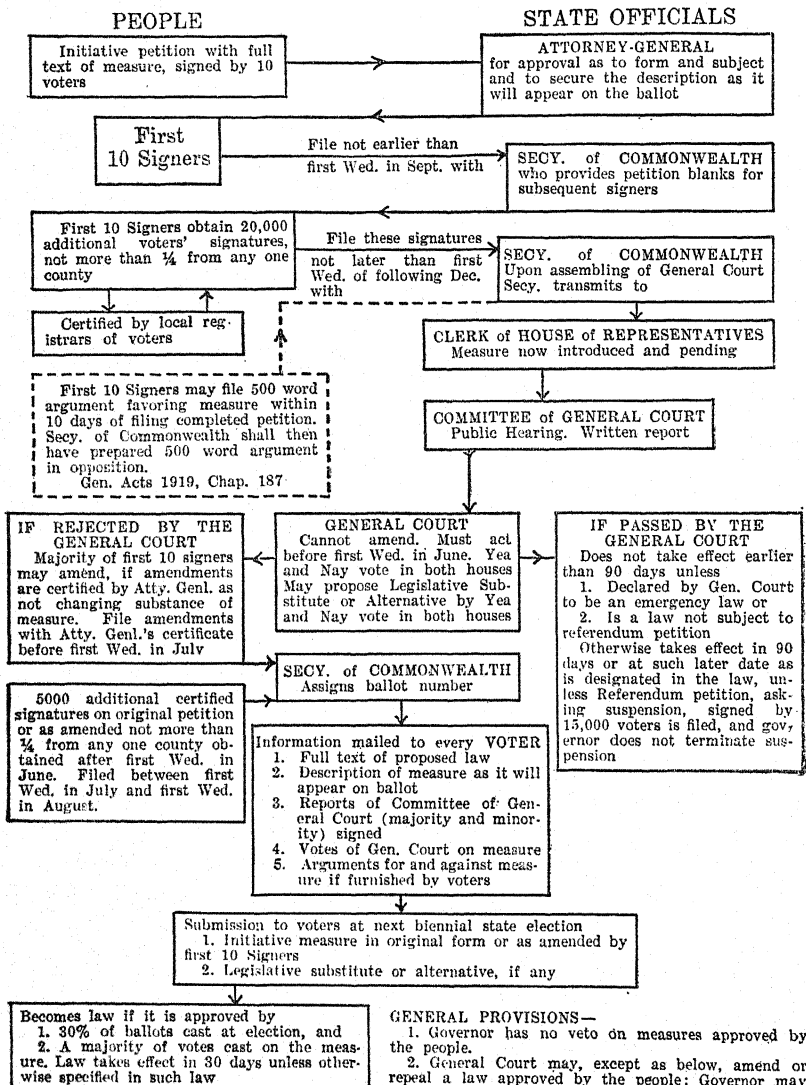
<sup>1</sup> Between 1900 and 1929, inclusive, a total of 272 statutory proposals were submitted to the voters under the popular initiative. Of this number, about one-third (91) were approved. During the same period, the statutory referendum was invoked 199 times, resulting in the popular rejection of 129 measures, or about sixty-five per cent. For these figures, we are indebted to Mr. Judson King, director of the National Popular Government League.

<sup>2</sup> The complete list of states is as follows: South Dakota (1898), Utah (1900, 1917), Oregon (1902), Nevada (1904), Montana (1906), Oklahoma (1907), Maine (1908), Missouri (1908), Michigan (1908), Arkansas (1910), Colorado (1910), California (1911), New Mexico (1911), Arizona (1911), Idaho (1912), Ohio (1912), Nebraska (1912), Washington (1912), Mississippi (1914), North Dakota (1914), Maryland (1915), Massachusetts (1918). An interesting account of instances of the initiative and referendum in colonial New England is K. Colegrove, "New England Town Mandates," *Colonial Soc. Mass. Publications*, XXI, 411-449 (1920).



## STATUTORY INITIATIVE PETITION IN MASSACHUSETTS

An Initiative Petition may propose and secure a decision by the voters upon any LAW upon any subject not expressly excluded.

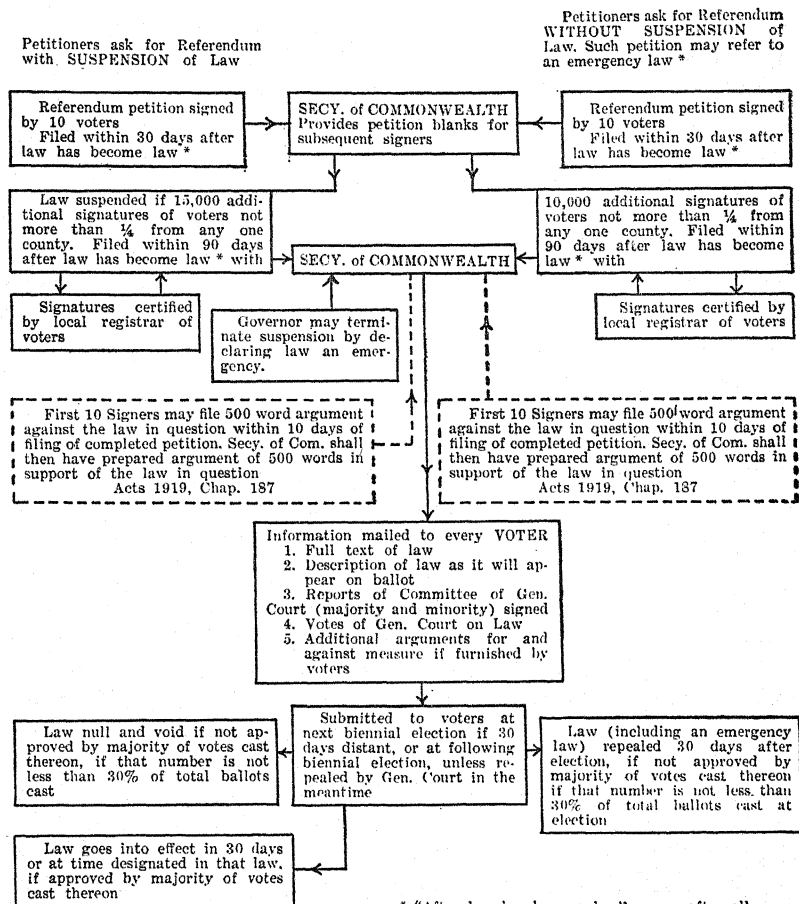


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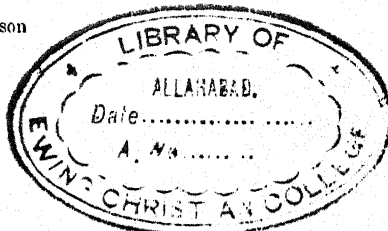
## STATUTORY REFERENDUM IN MASSACHUSETTS

A Referendum Petition may ask for a referendum to the voters upon any LAW enacted by the General Court which is not expressly excluded.



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cussion in recent years, notably in Illinois, where it has been repeatedly endorsed by large popular majorities.<sup>1</sup>

The initiative and referendum laws now in force differ considerably,<sup>2</sup> yet a general characterization of them is not difficult. In the first place, it should be noted that referenda may be either optional or obligatory. An optional referendum takes place when the legislature, desiring to obtain an expression of popular sentiment upon a certain measure, provides that the measure shall not go into effect until it shall have been approved by the voters at an election; or the legislature may leave different districts or counties to determine, each for itself, whether a certain law shall apply to them. This use of the referendum was not uncommon before 1898. The initiative and referendum which we are here considering, however, are of the obligatory or mandatory type, and do not depend upon the will of the legislature. When this form exists, legal provision is usually made for suspending all ordinary legislative enactments for a certain period, usually ninety days from the date of their passage.<sup>3</sup> During this interval the people of the state have an opportunity to scrutinize the work of their law-makers; and if a stated number or percentage of voters agree that a given act is undesirable, they can, by filing a petition, prevent that act from taking effect until it has been submitted to the people and ratified by popular vote.<sup>4</sup>

The initiative may be invoked whenever any considerable number of people believe that the legislature has failed to enact necessary and desirable laws. A citizen or group of citizens may, with or without the assistance of lawyers, draw up a bill designed to meet

<sup>1</sup> The initiative and referendum for city ordinances is authorized in almost all commission-governed cities, including those in Illinois.

<sup>2</sup> Various initiative and referendum laws will be found in C. A. Beard and B. E. Schultz, *Documents on the State-Wide Initiative, Referendum, and Recall* (New York, 1912). Cf. *Ill. Const. Conv. Bull.*, No. 2, "The Initiative, Referendum, and Recall" (Springfield, 1920); *Mass. Const. Conv. Bull.*, No. 6, "The Initiative and Referendum" (Boston, 1917).

<sup>3</sup> In Massachusetts, 15,000 signatures are required for a referendum petition in order to suspend the operation of an act, whereas only 10,000 are required for a referendum without suspension.

<sup>4</sup> Certain measures, designated as emergency acts, are often exempted from the referendum. In some states it has been possible to prevent a referendum on measures by inserting in them a clause declaring them to be emergency measures, when clearly no emergency exists. In Colorado, e.g., constant insertion of emergency, or "safety," clauses has largely nullified the value of the referendum. See *Harvard Law Rev.*, XLIII, 813-818 (Mar., 1930). To put a stop to this abuse, Oregon, in 1921, adopted an amendment authorizing the governor to veto the emergency clause in any measure whenever, in his judgment, no emergency existed.

a recognized need. This done, the next step is to obtain the signature of a specified number of voters to a petition requesting that the bill be enacted into law. The petition is filed with the proper authority, and then either one of two courses is taken, according as the law of the state prescribes. One is called the direct initiative; the other, the indirect initiative. Under the direct initiative, the proposed measure is submitted to the people at the next regular election or at a special election, without being previously submitted to the legislature. Under the indirect initiative, the bill must be submitted to the legislature at its next session; and if that body acts favorably upon it, it becomes a law without the necessity of a referendum.<sup>1</sup> If the legislature fails to act favorably, the bill is referred to the people and becomes a law if approved by the required vote. In most states, the legislature is not permitted to amend a bill originating under the popular initiative, but in others it may put before the people a rival or substitute measure. The governor has no power to veto any measure passed under the initiative and referendum.<sup>2</sup>

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The arguments for and against the initiative and referendum have been fully set forth in many places.<sup>3</sup> In summary, the chief advantages urged are: (1) the system unquestionably gives the electorate an affirmative and negative check upon the legislature, the need of which has long been felt in many states, especially in those in which political "machines" or special interests have dominated the legislature; (2) it tends to stimulate popular interest in the work of the legislature, for the electorate is directly responsible if laws are unsatisfactory;<sup>4</sup> (3) it tends to reduce legislative corruption because the legislature's decision on proposed laws is no longer final, and it has been the finality of that decision that has made it worth while to resort to corrupt methods to influence

Arguments  
for direct  
legislation

<sup>1</sup> Voters who disapprove a law passed by the legislature under the initiative may invoke the referendum after its enactment, by compliance with the rules applicable to bills originating in the legislature.

<sup>2</sup> In some states, *e.g.*, Massachusetts, additional signatures to the initiative petition are required in order to bring the measure to a popular vote after it has failed to pass the legislature.

<sup>3</sup> The most comprehensive discussion of all phases of the initiative and referendum is to be found in *Mass. Const. Conv. Debates*, II (Boston, 1917); *Illinois Const. Conv. Proceedings, 1910-1922* (Springfield, 1923) I, 239-342. See also G. H. Haynes, "How Massachusetts Adopted the Initiative and Referendum," *Polit. Sci. Quar.*, XXXIV, 454-475 (Sept., 1919).

<sup>4</sup> In half of the states having the initiative and referendum, "publicity pamphlets" are provided for. These contain an exact copy of all measures referred to the voters, together with such arguments pro and con as interested persons may care to advance. Copies are mailed by some state official to all of the voters before each election.

legislative action; (4) inasmuch as the people are given the final word as to what shall be law, many existing constitutional limitations on the legislature may safely be relaxed or repealed altogether; (5) constitutions in many instances may also be considerably shortened by the omission of articles dealing in detail with subjects which were purposely placed beyond reach of the legislature at a time when there was no opportunity, such as the initiative and referendum afford, to reverse or to supplement unsatisfactory legislative action.

Objections  
to direct  
legislation

Of the numerous objections which have been urged against the initiative and referendum, the more weighty are the following: (1) the average voter is incapable of voting intelligently upon matters of legislation; (2) the system is, at best, "a calling for the yeas and nays, not for a full expression of opinion," and it assumes that voters are ready and able to give an unqualified yes or no to any question of public policy referred to them; (3) the system, by failing to rouse interest on the part of many citizens, often results in the enactment of laws by a minority of the voters;<sup>1</sup> (4) the electorate is often put to the needless trouble and expense of passing upon questions which, although unimportant, may be forced upon the attention of the public through the activities of small organized groups; (5) the work of obtaining petition signatures for legislative measures is often attended by irregularities and fraud;<sup>2</sup> (6) where the initiative and referendum may be used both for constitutional amendments and for ordinary legislation, the system places the fundamental civil and political rights of minorities at the mercy of temporary majorities at the ballot box; (7) the system tends to break down the quality of legislatures by weakening the sense of responsibility on the part of the individual member for what is enacted or fails of enactment, since, with the initiative and referendum, the electorate may correct any misinterpretation of its wishes; (8) the system tends to aggravate the burdensome and confusing task already imposed upon the voters by requiring them not only to select a large number of public offi-

<sup>1</sup> C. O. Gardner, "Problems of Percentages in Direct Government," *Amer. Polit. Sci. Rev.*, X, 500-514 (Aug., 1916). "In California, during the years 1908-1915, when no publicity pamphlets were issued, the average vote upon measures submitted was 43 per cent of the total attendance at the polls; in 1916, with the publicity pamphlet in use, it was 79 per cent." W. B. Munro, *The Government of the United States*, 507, note, citing G. H. Haynes, *The Initiative and Referendum* (Boston, 1917), 37. See also A. N. Holcombe, *State Government in the United States* (2nd ed.), 498-501.

<sup>2</sup> See W. A. Schnader, "Proper Safeguards for the Initiative and Referendum Petition," *Amer. Polit. Sci. Rev.*, X, 515-531 (Aug., 1916).

cers, but also to pass upon any number whatever of legislative proposals which may be submitted on the same ballot; (9) the scheme may be misused by a minority party in the legislature to prevent the principal laws enacted by the majority party from taking effect, as happened in Missouri<sup>1</sup> in 1921-22.

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Space does not permit pointing out in detail how some of these objections might apply with equal force to the submission of constitutions and constitutional amendments to popular vote; or how others also apply to laws enacted in the usual way by the legislature acting alone; or how still other grounds of objection might be removed by improving the details of initiative and referendum procedure, or by withdrawing certain subjects from the operation of the initiative and referendum altogether, as has been done in Massachusetts.<sup>2</sup> It must be remembered that the system of direct legislation, as now employed in connection with state law-making, is designed primarily to weaken the influence of bosses, machines, or special interests, such as have dominated many a state legislature at one time or another, and often for long periods. As a remedy for such conditions, the system is not infallible, any more than is the Australian ballot or the direct primary. Nevertheless, to many people it seems to be the best expedient available at the present time for vetoing or supplementing the acts of a legislature which proves to be, not a representative, but a misrepresentative, law-making body.<sup>3</sup>

A useful  
device, but  
not a  
panacea

<sup>1</sup> In 1921, the state Democratic organization obtained the necessary petitions for a referendum on practically all of the important measures enacted by the Republican legislature in that year. These measures came to a vote in November, 1922, and all but one were rejected. See *Nat. Mun. Rev.*, X, 438 (Aug., 1921); *ibid.*, X, 575 (Nov., 1921); N. D. Houghton, "The Initiative Referendum in Missouri," *Mo. Hist. Rev.*, XIX, 268-299 (Jan., 1925).

<sup>2</sup> Under the Massachusetts amendment, the following matters fall outside the scope of the popular initiative: measures which relate to religion, religious practices, or religious institutions; appointment, qualifications, tenure, removal, recall or compensation of judges; reversal of judicial decisions; powers, creation, or abolition of courts; purely local laws; specific appropriations of money from the state treasury; granting state aid to sectarian institutions; propositions inconsistent with the right to receive compensation for private property taken for public use; the right of access to, and protection in, the courts of justice; the right of trial by jury; protection from unreasonable search, and from martial law; freedom of speech, press, peaceable assembly, and elections. Exceptions to the operation of the referendum include laws which relate to religion, religious practices, or religious institutions; appointment, qualifications, tenure, removal or compensation of judges; creation or abolition of courts; purely local laws; and laws which appropriate money for the current or ordinary expenses of the commonwealth or for any of its departments, commissions, or institutions.

<sup>3</sup> An interesting comparison of legislative votes and referendum votes upon the same measures is found in B. A. Arneson, "Do Representatives Repre-

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## CHAPTER XXXIII

### THE LEGISLATURE AT WORK

The legislature is, in general, free to organize itself in whatever manner it chooses and to carry on its work under rules of its own making. Naturally, there is variation in these matters from state to state. Yet in their larger aspects organization and procedure are everywhere much the same, partly because similar tasks lead to similar modes of action, partly because there has been a good deal of copying by one state from another, but mainly because of the inevitable tendency to follow the example of Congress. The presiding officer of each house, the committee system, the handling of bills and resolutions, the rules of debate—all show the profound influence of the federal example.

General  
similarity  
of organ-  
ization

The presiding officer in the lower house is, as in the House of Representatives at Washington, a speaker; and, like his national prototype, he is elected by the entire house, although the representatives who belong to the majority party actually choose him in caucus. In most of the upper houses, the lieutenant-governor presides, after the manner of the vice-president in the United States Senate; in the other cases, a president of the senate is elected by the members of that body from among their own number. These presiding officers exercise substantially the same influence and authority over the proceedings of their respective houses that are exercised by the speaker and vice-president in Congress; and the other members of the legislature enjoy about the same privileges and immunities as members of Congress.<sup>1</sup> The power of the speakership has developed most in states where there is a large amount of business to be transacted, where the house is so large as to be unwieldy, where sessions are of short duration, and also where, as in New York, party lines are closely drawn. Each house of the legislature also chooses a clerk, a chaplain, a sergeant-at-arms, and other necessary officers and attendants.<sup>2</sup>

Officers

<sup>1</sup> O. P. Field, "The Constitutional Privileges of Legislators," *Minnesota Law Rev.*, IX, 442-457 (Apr., 1925).

<sup>2</sup> Not infrequently, spoils considerations lead to "padding the payroll i.e., increasing the number of legislative employees out of proportion to actual requirements.



CHAP.  
XXXIII

Commit-  
tees:  
composi-  
tion and  
number

Every legislature is subdivided into committees for the more effective consideration of the large number of measures introduced.<sup>1</sup> Appointments to these committees are usually made by the presiding officers of the respective houses, although in a number of the states the assignments are made by a committee on committees. Whichever method is employed, the dominant party almost invariably has a majority on each committee. There is much difference of opinion upon the relative merits of the two methods. In Nebraska, at all events, it is felt that the use of a committee on committees has secured the important places for the persons best fitted for them, has done away with the suspicion of trading committee appointments in order to secure votes for the position of presiding officer, and has distributed committee assignments more equitably among the different sections of the state.

The joint-  
committee  
system

The number of senate committees varied in 1917 from five in Massachusetts and Wisconsin to sixty-two in Michigan; in about two-thirds of the upper houses, the number exceeded twenty, and in five cases it exceeded forty. The number in the lower house ranged from seven in Massachusetts to sixty-three in Kentucky and sixty-five in Michigan, almost half of the states having forty or more. In Massachusetts and a few other states, the bulk of legislation is handled by a system of joint committees made up of members from both houses. This arrangement has several points of distinct advantage over the dual committee system. In particular,

<sup>1</sup> Bills are assigned to appropriate committees by the presiding officer in each house, although his action may be overruled by the house and the bill sent to another committee.

The following are the usual steps in the enactment of a bill, although slight variations are to be found in the different states:

(1) Introduction by any member or by a committee. A member either rises in his place and asks permission to introduce a bill (permission is never withheld) or merely files the bill at the clerk's desk;

(2) First reading, generally by title only, followed by order for printing copies for use of members, and reference to a committee;

(3) Consideration in committee, followed by favorable or adverse report to the house;

(4) Second reading at length, with opportunity for debate and amendment;

(5) Third reading, with some further opportunity for debate and amendment, followed by the final vote on the perfected bill;

(6) Transmission to the other house, where practically the same routine is followed;

(7) Appointment of a conference committee to adjust differences between the two houses;

(8) Adoption of the report of the conference committee in each house;

(9) Submission of the bill as enacted to the governor for his approval or veto;

(10) Return of the bill, if vetoed, to the house in which it originated; if passed by the requisite majority, it goes to the other house for similar action.

it avoids the duplication and delay which are more or less inevitable when the same measures are handled by two committees, and it reduces the tendency to shift responsibility from one house to the other.<sup>1</sup> In most states the number of committees is far larger than the efficient handling of legislative business requires. As a rule, it has been determined more by petty personal and political considerations than by the necessities of good procedure. The disadvantages of too many committees are obvious. In the first place, each member is required to serve on more committees than he can actually give time to; in the Illinois senate of 1923, each member belonged, on an average, to about twelve committees. Furthermore, too many committees means reference to different committees of matters of the same general nature which could more satisfactorily be handled by a single committee. A reduction in the number of committees in Illinois in 1915 from sixty-six to thirty-three in the house, and from forty-one to twenty-six in the senate, contributed in a large measure to the increased efficiency with which legislation was handled that year.

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Commit-  
tees com-  
monly too  
numerous

Even these numbers are needlessly large. In most legislatures, if not in all, business could be handled more promptly and efficiently if a system of joint committees on the Massachusetts model were substituted for the dual committee system; the number of these joint committees should not exceed fifteen, and all should be organized on functional lines. To half a dozen major committees on finance, agriculture, industrial affairs and manufacturing, public utilities, municipalities, and judiciary, ten minor committees might be added, somewhat as follows: public efficiency and civil service, elections, enrolled and engrossed bills (or third reading), education, rules, rights of minority, public welfare, hygiene and sanitation, public works, banking and insurance, and miscellaneous matters.<sup>2</sup> If, however, the joint committee system cannot be adopted, there should at least be a uniform committee organization in the two houses; and this organization ought to be coördinated with the administrative organization of the state, in order to bring the legislative and executive branches into closer relationship.

Desirable  
reorgan-  
ization

Surprisingly few states have followed the example of California and Nebraska in having a definite schedule of committee meetings and hearings prepared at the opening of each session, and assigning

<sup>1</sup> A. N. Holcombe, *State Government in the United States* (2nd ed.), Chap. IX.

<sup>2</sup> This is substantially the plan recommended by C. L. Smith in *Amer. Politt. Sci. Rev.*, XII, 607-639 (Nov., 1918).

definite days and hours for the meetings of each committee. With a rule limiting the number of committees on which each member may serve, it is possible so to group committee meetings as to prevent members excusing their absence on the ground that they were attending some other committee meeting. Obviously, the fewer committees there are, the easier it will be to develop such a schedule.<sup>1</sup>

Other  
defects of  
the com-  
mittee  
system

Other defects of the present committee system must be passed over rapidly. Committees are often so large as to make them unwieldy, thus throwing undue power into the hands of the chairmen or of sub-committees. The largest committees are found in Pennsylvania, Illinois, and Iowa, where memberships range from twenty-five to forty-seven. Another serious defect in most states is the secrecy—at all events, lack of publicity—and the irresponsibility surrounding committee sessions. Few states require committees to publish notices of the time and place of their meetings, as they are required to do in Massachusetts and Nebraska; or to maintain public calendars of all committee meetings and hearings, as is done in Wisconsin; or to keep and publish minutes of all proceedings; or to open all sessions to the public. In the great majority of states, furthermore, the two houses have retained insufficient control over their committees, one of the results being the frequency with which committees indefinitely retain, and thus smother, measures which have been referred to them. This situation is deliberately maintained in the interest of the legislative “machine” in some states, especially where there are “graveyard” committees consisting of tried and trusted machine leaders, to which measures are referred with the confident expectation that they will not be heard of thereafter during the session. In 1913, a committee of this sort in the Pennsylvania senate smothered 137 bills which had passed the lower house. Restrictions should be placed upon the length of time which a measure may remain in the hands of a committee without being reported; and the rules should be so amended as to make it easier to compel a committee to report a measure which it has had in its possession for a reasonable length of time.

Overworked  
and idle  
committees

Another common defect is unequal distribution of legislative work among committees. In the Ohio legislature of 1919, for example, four committees in the house and four in the senate had no work whatever; four house, and six senate, committees had only one or two measures to consider; and seven committees in the house and eleven in the senate had only three or four measures. In other

<sup>1</sup> C. L. Smith, *op. cit.*, 631.

words, thirty-six committees had nothing, or practically nothing, to do. On the other hand, the senate judiciary committee received eighty-two measures, and the corresponding house committee received seventy-three; while sixty-one and sixty-six measures went to two other house committees, respectively.<sup>1</sup> Out of a total of 797 bills referred to committees in the lower house in Illinois in 1923, 454 were handled by four committees, while some of the other committees had almost nothing to do. One also often finds the same duplication of older and more influential members on a half-dozen of the most important committees which has appeared in the case of congressional committees, and which is a further explanation of the success with which the legislative "machine" does its work. In the Illinois senate of 1923, each of seven members was on twenty or more committees, one member serving on thirty. There are also features connected with the operation of the committee on rules, the "steering" committee, and the conference committees<sup>2</sup> which enable these agencies to become autocratic and irresponsible masters of legislative proceedings, especially in the last crowded days of a session.

CHAP.  
XXXIII

The "interlocking" system

Finally, the committee system in many legislatures should be so reorganized as to bring about closer and more harmonious relations among all committees which in any way, directly or indirectly, have to do with financial legislation. Our legislatures have long had a reputation for wastefulness and extravagance. In part, this arises from the fact that until recently their methods of handling financial measures were full of confusion and in urgent need of systematization. Almost all legislatures have had several committees at the same time dealing with financial matters, each house having its separate set of such committees. Frequently, each of these committees and sets of committees has worked more or less independently of, and even in rivalry with, the others. There have been in each house a committee on raising revenue, commonly called the commit-

Importance of reorganizing committees which handle financial legislation

<sup>1</sup> C. A. Dykstra, in *Civic Affairs*, Aug., 1919. On the organization and work of the Ohio legislature of 1927, see report of the legislative committee of the Citizens' League of Cleveland, in *Greater Cleveland*, II, 175-182 (June 15, 1927).

<sup>2</sup> Conference committees are appointed by the respective presiding officers of the two houses when a bill originating in one house has been changed during its passage through the other. It is customary to appoint on such committees, in addition to other persons, the chairmen of the house and senate committees which have had the bill in charge. These conference committees endeavor to reach a compromise on the points of difference between the two houses. If they are successful, the measure as reported by them almost invariably passes both houses without further debate.

tee on ways and means, and further committees in charge of appropriation bills. Still different committees have often handled measures which are not technically appropriation bills although seriously affecting the state finances—for example, bills establishing a state police organization, a state public utility commission, or authorizing a re-codification of the state laws. Numerous such measures carrying incidental charges upon the state treasury have been passed without any serious attempt to ascertain the total amount of demands upon the treasury until after the legislature has adjourned. As a result, deficits have been very common. Committees on "contingent expenses" are also often found in one or both houses, and are a favorite instrument of corrupt politics.

Within the past few years, however, especially in connection with the movement for budget reform, a number of states have introduced important improvements in their methods of handling financial legislation. In a few cases, all appropriation bills are assigned to one committee in each house, and to this committee must be referred, before final passage, all measures which directly or indirectly involve an expenditure of state funds, so that a complete and detailed list of charges on the treasury may be tabulated some time before the legislature adjourns. Such reforms might well be carried farther to include a consolidation in each house of the money-raising and money-spending committees in a single committee, in order to ensure a better balancing of income and outgo than is now possible in most states; and a still greater degree of responsibility would result if a single joint finance committee were to be substituted for the present separate committees of the two houses.<sup>1</sup>

Most of the older states more or less deliberately copied the congressional procedure in force at the time of their admission into the Union; and the newer states have usually adopted *en bloc* the body of rules in operation in some near-by state, rarely venturing upon any experiments of their own. Once adopted, the rules are seldom changed. Legislators who would not hesitate a moment to propose drastic changes in statute laws, or in the organization of the administrative branches of the government, commonly display little or no originality, courage, intelligence, or perseverance in

<sup>1</sup> Excellent discussions of the committee system will be found in C. L. Smith, "The Committee System in State Legislatures," *Amer. Polit. Sci. Rev.*, XII, 607-639 (Nov., 1918); P. S. Reinsch, *American Legislatures and Legislative Methods*, Chap. V; F. E. Horack, "The Committee System in Iowa," in *Statute Law-Making in Iowa* (Iowa City, 1916), 533-609; and H. W. Dodds, "Procedure in State Legislatures," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXXVII, Supp. (May, 1918).

introducing and insisting upon changes in the rules governing the proceedings of their own body. These rules should be such as to expedite business, to ensure adequate consideration of measures both in committees and on the floor of the two houses, to give a fair opportunity for all parties to be heard in debate, and to secure publicity and responsibility at every stage of the law-making process. In few states, however, have rules been adopted with these ends primarily in mind.<sup>1</sup> Both in Congress and in a great majority of state legislatures, rules have been so constructed in times past as to perpetuate the power and influence of a small group of the more experienced members, commonly referred to as the legislative "machine," whose controlling influence might be undermined by simplifying and clarifying the processes of legislation.<sup>2</sup>

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XXXIII

When a legislature assembles for the first time, most of the members are inexperienced and wholly unfamiliar with the legislative rules. The older members, or a well-organized inner group of them, who know the value of these old rules for their purposes, quickly move the adoption of the rules of the preceding session, usually without any change whatsoever. This motion commonly goes through without opposition from the newer members, who, indeed, seldom know what to oppose. Thus the house finds itself bound by rules which include one relating to the process by which these same rules may be amended. This process has purposely been made very difficult by former legislative leaders in order to prevent "insurgent" or independent groups from overthrowing or undermining the influence of the "machine." Therefore, if any thoroughgoing reform in the rules is to be effected, the new members must make a careful study of them and their practical operation before the legislature convenes, and must get together and organize before that date, just as the "old guard" does, so as to coöperate effectively in bringing about changes at the strategic moment. Some of these changes, *e.g.*, "gateway amendments" making it easier to amend the rules, must obviously be adopted, if at all, at the opening session before the old guard rivets down the former rules unchanged.

Effects of  
the inexperience  
of new  
members

Rules which are really effective in expediting business have been

<sup>1</sup> A comprehensive study of legislative rules is to be found in H. W. Dodds, "Procedure in State Legislatures," cited in preceding footnote.

<sup>2</sup> For an illuminating exposition of the way in which legislative rules may be utilized to perpetuate control of legislative machinery, see Congressman M. Clyde Kelley, *Machine-Made Legislation* (Braddock, Pa., 1912), based upon the author's observation as a member of the Pennsylvania legislature of 1911.

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XXXIII

Congestion  
of business  
during the  
closing  
days of a  
session

put into operation in fewer than a third of the states. The lack of them often entails very serious consequences, especially in states where the duration of the legislative session is limited by the constitution. Almost everywhere, a great deal of time is wasted in the early part of the session, or at best is consumed in organizing, in making committee assignments, and in gaining familiarity with the complicated rules. Moreover, the legislature is rarely in session more than four days a week. During this time, the main work is being done by the various committees; and comparatively few states have rules compelling committees to report on bills assigned to them within a specified time. Furthermore, experienced members sometimes deliberately seek to delay action on bills in which they have a peculiar interest, in the hope that the measures will be able to slip through without attracting attention. The result is a most unseemly crowding of business into the last two weeks or ten days of the session, during which the houses work overtime, and often amid the most demoralizing confusion.<sup>1</sup>

Congestion  
avoided  
in Massa-  
chusetts

That such congestion is quite needless is proved by the experience of Massachusetts. Although the number of bills introduced in the legislature of that state exceeds the number appearing in many other states, no final rush of the kind just described ever takes place. The rules are devised largely for the purpose of obtaining a prompt consideration of measures, and a joint committee system has contributed greatly to the achievement of that result. Substantially all measures are introduced early in the session, which opens in January. Committees are required to report on all measures referred to them not later than the second Wednesday of March; and although this period may be extended by one month, at its expiration all measures in the hands of committees must be reported within three days, except appropriation bills.<sup>2</sup> After reporting and second reading, bills go to the committee on third reading,<sup>3</sup>

<sup>1</sup> See p. 716 above. One legislature which was in session four months, and in that time passed over eight hundred laws and resolutions, enacted half of this number in the last fifteen days, at an average rate of almost thirty a day, an even hundred being passed on the last day.

<sup>2</sup> Similar time limits are in force in only about one-third of the states. See *Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department," 560 ff. For further details relating to procedure in the Massachusetts legislature, see L. A. Frothingham, *A Brief History of the Constitution and Government of Massachusetts* (2nd. ed., Cambridge, 1925), Chap. vii; A. C. Hanford, "Massachusetts, Different from the Others," *Nat. Mun. Rev.*, XIII, 40-48 (Jan., 1924).

<sup>3</sup> It should be added that this committee on third reading exercises a careful scrutiny of each bill before final passage to see what defects there may be in it, and how it fits in with existing legislation. This part of the committee's work

### CAREER OF A BILL THROUGH THE MASSACHUSETTS LEGISLATURE

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graph TD
    subgraph Senate_Path [Senate Path]
        S1((SENATE  
1ST READING)) --> S2[SENATE  
CALENDAR  
2ND READING]
        S2 --> S3[SENATE  
COMMITTEE  
ON BILLS IN THE  
SENATE]
        S3 --> S4[SENATE  
CALENDAR  
3RD READING]
        S4 --> S5((PASSED  
TO BE  
ENGROSSED))
    end

    subgraph House_Path [House Path]
        H1[HOUSE  
1ST READING] --> H2[HOUSE  
CALENDAR  
2ND READING]
        H2 --> H3[HOUSE  
COMMITTEE  
ON BILLS IN THE  
HOUSE]
        H3 --> H4[HOUSE  
CALENDAR  
3RD READING]
        H4 --> H5((PASSED  
TO BE  
ENGROSSED))
    end

    S5 --> C1[TO SENATE  
FOR ENACTING  
PRESIDENT'S  
SIGNATURE]
    H5 --> C2[TO HOUSE  
FOR ENACTING  
SPEAKER'S  
SIGNATURE]

    S5 --> C3[TO GOVERNOR  
FOR SIGNATURE]
    H5 --> C3

    S5 --> C4[TO HOUSE  
FOR ENACTING  
SPEAKER'S  
SIGNATURE]
    H5 --> C4

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FOR ENACTING  
PRESIDENT'S  
SIGNATURE]
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FOR SIGNATURE]
    H5 --> C6

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FOR ENACTING  
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SIGNATURE]
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FOR ENACTING  
PRESIDENT'S  
SIGNATURE]
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FOR SIGNATURE]
    H5 --> C9

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FOR ENACTING  
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SIGNATURE]
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SIGNATURE]
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SIGNATURE]
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FOR SIGNATURE]
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SIGNATURE]
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FOR SIGNATURE]
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SIGNATURE]
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PRESIDENT'S  
SIGNATURE]
    H5 --> C95

    S5 --> C96[TO GOVERNOR  
FOR SIGNATURE]
    H5 --> C96

    S5 --> C97[TO HOUSE
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Courtesy of Lt. Governor Frank G. Allen



and if there is delay here, a report may be forced. Ordinarily, this committee reports within two or three days, and the bill is then voted on.

In other states, a variety of less effective devices have been tried. Some prohibit the introduction of new bills after a certain date, or within so many days of final adjournment; after the specified date, new bills may be introduced only by unanimous consent, or at least by a two-thirds or three-fourths vote. California has brought into use the split session. The first part may last thirty days, and is almost wholly devoted to the introduction and reference of measures. A month's recess is then taken for the purpose of enabling both the members and the public generally to study the bills introduced. When the legislature reconvenes, new bills may be introduced only with the consent of three-fourths of the members; and no member may introduce more than two such bills. In this state and in Massachusetts, the split session has been definitely authorized by constitutional amendment; in Alabama, on the other hand, it exists wholly at the discretion of the legislature and without any specific authorization by the constitution.<sup>1</sup>

Most legis-  
lators are  
not experts

None of our state legislatures can by any stretch of the phrase be called a body of experts on either the form or the substance of legislation. Members come from all walks of life and ordinarily give only a few months once in two years to the business of law-making. Apart from the lawyers, who generally form the largest single group, few have had training or experience which in any degree specially qualifies them to frame laws; and in view of the numerous pitfalls which lie in the legislator's pathway, it may be doubted whether many of the lawyers who appear in legislative bodies are able to draw up important public measures in proper technical form. Furthermore, a comparatively small proportion of

is attended to by a trained secretary, and the result is that the laws of Massachusetts are on the whole probably not excelled in technical form by those of any other state.

<sup>1</sup> A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 274 n. 3. From 1920 to 1928, West Virginia also employed the split session plan. See V. J. West, "Our Legislative Mills: California, the Home of the Split Session," *Nat. Mun. Rev.*, XII, 369-376 (July, 1923); R. Luce, *Legislative Assemblies*, Chap. VIII; M. L. Faust, "Results of the Split Session System of the West Virginia Legislature," *Amer. Polit. Sci. Rev.*, XXII, 109-121 (Feb., 1928). Massachusetts, in 1918, adopted a constitutional amendment empowering the legislature, within the first sixty days of a session, to take a recess of not more than thirty days. As yet (1931), however, the legislature has not adopted the split session. In 1920, the people of Oregon rejected a constitutional amendment providing for a split session. *Amer. Polit. Sci. Rev.*, XV, 264-265 (May, 1921).

the members of either house have had previous legislative experience. Rarely does it happen, as it did in Illinois in 1917 and 1919 and in California in 1927, that a majority in each house has served in former legislatures; far more commonly, only a third or a fourth of the members have had any experience in legislative work.<sup>1</sup>

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This lack of special qualifications for the technical side of law-making is not so serious as might be supposed, for, contrary to the popular impression, comparatively few measures are drafted by the legislators themselves. The great majority of bills are prepared by lawyers outside the legislature who have been employed for that purpose by private individuals, associations, committees, or corporations, or by county, municipal, or other local government bodies; or they are prepared by some of the principal state executive officers.<sup>2</sup> Bills drawn by one or another of these agencies may be formally introduced in the legislature by any member. A member who renders this service may assume responsibility for the measure which he presents, or he may expressly disclaim all responsibility for it by saying that he merely introduces it "by request." Unfortunately, no limit is placed upon the number of measures which individual members may introduce, and no satisfactory way has yet been devised of checking the avalanche of good, bad, and indifferent legislative proposals which descends biennially in practically every state.

Bills are commonly drafted outside of the legislature

To meet the ordinary legislator's need for assistance on the technical side of law-making, a considerable number of legislatures have created a bill-drafting bureau, often in connection with a legislative reference library, although in other instances the two are entirely distinct; and every member is privileged to avail himself as much as he likes of the assistance which this bureau, through its experts in bill-drafting, can render in putting his ideas into

Bill-drafting bureaus

<sup>1</sup> Out of 153 members of the lower house of the Illinois legislature of 1917, 90 had served in the preceding legislature, as had 14 out of the 25 newly-elected senators. Two years later, the house had 97 members, and the senate 19 out of 26 newly-elected members, who had served in the previous legislature. In the California legislature of 1927, only six out of forty senators and 22 out of 80 members of the lower house had not had previous legislative experience. On the other hand, in the Minnesota lower house in 1911 only 45 out of 120 had served before; in Missouri in 1911, only 41 out of 143; in North Dakota in 1909, only 24 out of 95; and in Vermont in 1911, only 22 out of 246. See *Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department;" C. L. Jones, *Statute Law-Making*, 12-13; R. Luce, *Legislative Assemblies*, Chap. xvi; A. C. Hanford, "Massachusetts, Different from the Others," *Nat. Mun. Rev.*, XIII, 46 (Jan., 1924).

<sup>2</sup> Cf. H. Walker, "Where Does Legislation Originate?," (in Ohio), *Nat. Mun. Rev.*, XVIII, 565-568 (Sept., 1929).

proper form for enactment into law.<sup>1</sup> Our state laws, in general, would be greatly improved in form, and fewer of them would be declared unconstitutional by the courts on purely technical grounds, if every measure had to pass the scrutiny of a well-trained staff of draftsmen before its introduction, or at least before its final enactment. In a few states this is required. For the successful operation of such a bill-drafting agency, it is essential that adequate salaries be paid the members of the staff in order to insure the services of highly capable lawyers; that they be appointed only after examinations thoroughly testing their ability; and that their positions be permanent and entirely free from any taint of the spoils system or partisanship.

Wise  
legislation  
involves  
careful  
study of  
proposed  
laws

Far the greater portion of the legislator's time is occupied in studying and making up his mind upon the merits of bills which have been prepared in one or another of the ways mentioned. Many of these measures affect large classes in the community and deal with highly complicated problems connected with manufacturing, mining, transportation, banking, insurance, taxation, the regulation of professions, the reorganization of local and state government, and numerous other subjects upon which even the best qualified legislator may well feel incompetent to act wisely without a great deal of reflection and enlightenment. To legislate intelligently upon such matters demands not merely good intentions, honesty, and fair-mindedness, but great industry and painstaking study of the conditions or problems which are to be affected by the proposed legislation. Happily, if the legislator's previous experience or study has not placed him in possession of first-hand knowledge of these matters, he may, if he is industrious and conscientious, acquire the requisite information in one or more of several different ways.

Sources  
of informa-  
tion:

1. Legisla-  
tive refer-  
ence  
libraries

First, he may go to the legislative reference library; in most of the states, some such institution has been established within the past fifteen or twenty years. There he will find that a trained staff has collected and carefully indexed for ready reference a great amount of useful material pertaining to subjects which may come before the legislature, such as taxation, education, labor, pensions, regulation of public utilities. He will find similarly available the statutes of the different states, judicial decisions interpreting and

<sup>1</sup> E. Cleland, "Bill Drafting," *Amer. Polit. Sci. Rev.*, VIII, 244-251 (May, 1914); P. Mason, "Legislative Bill Drafting," *California Law Rev.*, XIV, 298-310, 379-392 (May-July, 1926).

applying these statutes in concrete cases, documents showing the weaknesses or defects which have developed in the actual administration of the laws, reports of state administrative officials, and governors' messages. He may receive valuable assistance from the library staff in drafting a measure which he has in mind, and also useful information regarding the way in which it may be safely steered through the intricate channel of legislative procedure. The extent to which legislators avail themselves of this source of help naturally varies greatly from state to state, and from legislature to legislature in the same state, and some members probably make no use of it whatever. Nevertheless, there is a great gain in having such an institution at hand for the use of those who care to take advantage of it.<sup>1</sup>

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Special commissions are not infrequently authorized by the legislature to investigate difficult and complicated problems and report their recommendations at a later session. Reports of such commissions dealing with taxation, the reorganization of the administrative branches of the state government, revision of the election laws, workingmen's compensation and other labor laws, insurance laws, civil service retirement and pension funds—to mention only a few—have been important aids to intelligent legislative action in more than one state in recent years.<sup>2</sup>

2. Reports  
of special  
commis-  
sions

Public hearings before committees constitute another channel through which legislators may acquire useful information concerning pending measures. At such hearings, arguments for and against a bill are presented to the committee having the measure in charge by private individuals, either in person or by attorney, and by private and public corporations through their officers or other representatives. Unfortunately, however, the legislators who are not on the committee are so occupied with other duties that they

3. Commit-  
tee hearings

<sup>1</sup> J. B. Kaiser, *Law, Legislative Reference, and Municipal Reference Libraries* (Boston, 1914); J. H. Leek, *Legislative Reference Work—A Comparative Study* (Philadelphia, 1925); *ibid.*, "The Legislative Reference Bureau in Recent Years," *Amer. Polit. Sci. Rev.*, XX, 823-831 (Nov., 1926); J. A. Lapp, "Making Legislators Law-Makers," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXII, 172-183 (May, 1916); A. A. Schwartz, "Legislative Laboratories Compared," *State Government*, III, No. 5, pp. 3-7 (Aug., 1930). For a detailed account of the organization and methods of the Wisconsin legislative reference library, see Charles McCarthy's article reprinted in P. S. Reinsch, *Readings on American State Government*, 63-74; E. E. Witte, "A Law-Making Laboratory," *State Government*, III, No. 1, pp. 3-10 (Apr., 1930).

<sup>2</sup> In 1929, sixteen state legislatures authorized 86 *ad interim* committees and commissions to study as many subjects during the ensuing biennium and to report to the succeeding legislature. The list is given in E. D. Bullock, "Before We Enact a Law," *State Government*, III, No. 2, pp. 12-13 (Mar., 1930).

CHAP.  
XXXIIIThe content  
of legisla-  
tion

seldom find time to attend such hearings, and therefore often do not directly receive much enlightenment therefrom.

Upon broad matters of public policy, such as prohibition, income taxes, and state aid for highway construction, the ordinary legislator may well represent, without much special study or investigation, the sentiments and desires of the community which elected him. But such broad subjects come before the legislature rather infrequently as compared with more detailed and technical questions. The same is true of laws relating to the rights and liabilities of citizens in their everyday social and business relationships, which, in most states, are in a fairly static condition; only a comparatively small part of the work of the legislature relates to the development of rules for the regulation of these relationships. For example, it has recently been calculated that of the 446 laws passed by the legislature of 1927 in Illinois, only forty-three can be classed as primarily regulating the private rights of individuals; sixty-nine related to state appropriations, 125 to state administrative matters, and 209 to local administrative matters.<sup>1</sup> If the foregoing data may be assumed to be fairly typical of the work of legislatures generally, the great bulk of state legislation pertains to such subjects as taxation, to appropriations for the support of the many state offices and the varied institutions and activities maintained by the state, and to the work of county, city, and other local governments.

Desira-  
bility of  
closer  
official  
relations  
between  
the legis-  
lative and  
executive  
branches

Most of the information which legislators need in order to act intelligently on such matters must come directly or in various roundabout ways from the officers, boards, or commissions having most to do with those things, who, presumably, are better informed upon them than the average legislator is apt to be. To the governor, therefore, to the heads of the various executive departments, to the superintendents of state institutions, to the directors of various state activities, to state administrative boards, to local government officials, and particularly to state officers who have a general supervision over various functions of local-government units (for example, the state tax commission, the state board of education, and the public utilities commission)—to all of these our legislators are obliged to look in order to obtain the information which is essential to intelligent action.

Inasmuch as perhaps nine-tenths of the work of the legislature to-day has to do with the administration of state and local govern-

<sup>1</sup> See *Ill. Const. Conv. Bull.*, No. 8 (1920), "The Legislative Department," 588-589; W. F. Dodd, *State Government* (2nd ed., 1928), p. 175.

ment, the dependence of the legislature upon the administrative organs of the government for information, and the dependence of the administrative authorities upon the legislature for power and for funds, point forcefully to not only the desirability, but the necessity, of close coöperation between the legislative and administrative departments if either is to do its work effectively. Unfortunately, whatever connection and coöperation exist to-day between them has to be achieved in roundabout ways. This condition is likely to continue until legislatures adopt rules permitting the governor and other executive officers of the state to prepare and introduce measures relating to their respective offices or departments, and giving such measures a specially favored place on the legislative calendars; and until legislatures adopt rules permitting and requiring the governor and other state executive officers to appear on the floor of either house to explain and defend their requests for appropriations or for other legislation. Unfortunately, there is slight reason to expect that many legislatures will, in the near future, introduce these desirable changes. Jealousy of executive influence and prestige is more than likely to prompt instant declaration, when the change is suggested, that "the fathers" in their wisdom decreed that the two departments of government should be, and should remain, separate and independent, and that to adopt the proposed arrangement would mean to violate the spirit, if not the letter, of the constitution. The people in most states will therefore probably have to wait until a constitutional convention gives formal recognition in the fundamental law to the importance of more direct official relations between the administrative and legislative organs of government.<sup>1</sup> Meanwhile, the effectiveness of state legislatures will continue to be seriously impaired by adherence to theories of the separation of governmental powers which, in the domain of state government, as in that of municipal government, have been proved by long experience to be injurious if rigidly applied.<sup>2</sup>

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How this  
relation  
might be  
brought  
about

<sup>1</sup> Under a constitutional amendment adopted in New York in 1927, "the legislature in considering the budget has the right to bring the governor and the department heads on the floor of either house and quiz them with respect to any of the budgetary information or proposals." *Nat. Mun. Rev.*, XVI, 743 (Dec., 1927).

<sup>2</sup> E. M. Sait, "Participation of the Executive in Legislation," *Acad. of Polit. Sci. Proceedings*, V, 127-140 (1914); H. L. Stimson, "Responsible State Government," *Independent*, LXXIX, 14-15 (July 6, 1914); W. D. Hines, "Our Irresponsible State Governments," *Atlantic Monthly*, CXV, 634-647 (May, 1915); C. L. Jones, "The Improvement of Legislative Methods and Procedure," *Amer. Polit. Sci. Rev.*, Supp., VIII, 191-215 (Feb., 1914).

CHAP.  
XXXIIILegislative  
leadership

In bodies as large and unwieldy as are most of our state legislatures, leadership is indispensable and is bound to appear in one form or another. If the members are to work intelligently and effectively, some one must select from the huge mass of bills those that are to be advanced to a final vote. Inasmuch as legislative bodies nearly everywhere are elected and organized along party lines,<sup>1</sup> a varying degree of leadership is likely to appear in the party legislative caucus, which is usually dominated by a small group of older and seasoned members who have become thoroughly familiar with the rules and are skillful in influencing their fellow-members.<sup>2</sup> In this group the speaker of the house and the president *pro tempore* of the senate are almost certain to be included, owing to the strategic positions which they hold in the legislative organization. Sometimes leadership is assumed mainly by the committee on rules, or by the steering committee, especially in the last crowded days of a session; or, less frequently, by the chairman of the appropriations committee and the chairmen of a few other committees. But in not a few instances, real leadership has been found to reside entirely outside the legally appointed law-making body, and to be exercised by certain unofficial and irresponsible party chiefs. When this happens, the legislature is commonly said to be "boss-ridden" or "machine-controlled."<sup>3</sup>

Executive  
leadership

Contrasting sharply with this sort of leadership is the rôle frequently assumed by the governor. In various ways, the state's chief executive has become a legislative leader of the first importance, especially in putting through measures to which he or his party became definitely committed at the time of his election.<sup>4</sup> In connection with financial legislation, also, his influence has been con-

See the plan of legislative reorganization advocated by Governor Hodges of Kansas in 1913, entitled "Distrust of State Legislatures: the Causes; the Remedy," reprinted in J. T. Young, *The New American Government and its Work*, 643-651; also the legislative organization outlined in the "model state constitution" sponsored by the National Municipal League, §§ 13-30, pp. 20-25.

<sup>1</sup> An exception is to be noted in the case of Minnesota, where the members are elected on a non-partisan ticket. On the absence of leadership in the Minnesota legislature, see R. E. Cushman, "Non-Partisan Nominations and Elections," *Annals Amer. Acad. Polit. and Soc. Sci.*, CVI, 83-96 (Mar., 1923).

<sup>2</sup> Usually the state legislative caucus is a far less important factor in legislation than its congressional counterpart.

<sup>3</sup> An admirable picture in fiction of a boss-controlled legislature (in New Hampshire) is to be found in Winston Churchill's *Coniston*. Essentially the same picture might have been drawn for the Pennsylvania legislature in the time of Quay and during the early years of the Penrose domination.

<sup>4</sup> The governor also sometimes exerts much influence upon the selection of presiding officers in the legislatures, and upon the assignment of members to the more important committees.

siderably enhanced by the recent movement for budgetary reform.<sup>1</sup> But, unfortunately, little has been done to establish his primacy as a leader in the field of general legislation. On the whole, our legislatures are, like Congress, sadly deficient on the side of public, official, and responsible leadership. As a result, systematic and comprehensive programs of legislative work are seldom mapped out in advance; and most measures are considered piecemeal, rarely in any logical or chronological order.<sup>2</sup> The importance of real executive leadership will be appreciated when it is recalled that upwards of nine-tenths of the work of the ordinary legislature has to do with the administration of state and local government;<sup>3</sup> and no other single official in the state can so readily obtain the information that is indispensable for the wise guidance of the law-making body in dealing with such matters. The need for executive leadership is quite obvious also when one takes account of the avalanche of legislative proposals that biennially descends upon most of our state legislatures. Between fifty and sixty thousand bills and resolutions, it has been estimated, appeared in the forty-odd legislatures meeting in 1923.<sup>4</sup> Although the number is not

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<sup>1</sup> See Chap. xxxvi below.

<sup>2</sup> To supply the needed leadership, the "model state constitution," proposed by the National Municipal League provides that the reorganized single-chamber legislature shall elect seven of its members who, with the governor, shall form a legislative council with power (1) to collect information concerning the government and general welfare of the state, and report thereon to the legislature; (2) to give consideration to any proposed legislation referred to it, and report its recommendations thereon to the legislature; (3) to prepare bills on any subject for the consideration of the legislature; and (4) to perform such other duties as may be assigned to it by the legislature. Members of this council are to receive compensation in addition to their salaries as members of the legislature (§§ 29-32, and pp. 22-25). For a criticism of this plan, see H. White, "Relations Between the Governor and the Legislature in the Model Constitution," *Nat. Mun. Rev.*, XV, 441-444 (Aug., 1926).

<sup>3</sup> See p. 738 above.

<sup>4</sup> Of this number, about 16,500 acts or resolutions were adopted. A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 256-257. In Nebraska, in 1913, over 1,300 bills were introduced in the lower house alone. In Illinois in the same year, 1,617 measures were introduced in the two houses, and this record was broken in 1917, when 608 bills were introduced in the senate and 1,039 in the house, making a total of 1,647. In Ohio, 987 bills were introduced in 1911, 1,139 in 1915, and 947 in 1919. In twelve state legislatures in 1915, more than 22,000 bills were introduced; while in 1913 the total number of measures introduced in the legislatures of forty states was in excess of 55,800. For tables showing the number of bills introduced in the regular legislative sessions of 1911-1916 inclusive, see *Equity*, Jan., 1919. Further details as to the number of legislative proposals appearing in Congress and state legislatures may be found in T. I. Parkinson, "Legislative Contribution to Progress," *Amer. Bar Assoc. Jour.*, XII, 95-99 (Feb., 1926); W. P. Helm, Jr., "The Plague of Laws," *Amer. Mercury*, X, 10-16 (Jan., 1927).



CHAP.  
XXXIIIMulti-  
plicity of  
bills

always so large, it probably seldom falls below the twenty-thousand mark.

The main explanation of this legislative fecundity is to be found in the fact that no legal limits have been placed upon the number of bills that may be introduced. A further explanation is found in the characteristically American tendency to seek a legislative remedy for every real or fancied ill that afflicts the body politic. And so we have, as in the case of Congress, bills relating to the most bewildering variety of subjects, many of them duplicates, many others dealing with the same subject in different ways. Some bills embody attempts to secure laws relating to matters which are clearly beyond the scope of the state's legislative power, and are therefore seldom heard of after they make their initial appearance. Others are important, but of doubtful constitutionality. Countless others are of unquestioned constitutionality, but have to do with matters of little moment; while not a few deserve the label commonly applied to them, namely, "freak measures." The vast majority of measures comprised in this amazing *mélange* never receive consideration on the floor of the houses, but die in committee, unwept and unsung.<sup>1</sup> Notwithstanding this high mortality rate, the number of bills of all sorts that finally pass both houses and become laws is enormous; and in the volume of "session laws" that appears shortly after the legislature adjourns one is certain to find a curious intermixture of crudely drawn measures of only ephemeral importance, and often of little more than local significance, and carefully drawn enactments of permanent value and of outstanding importance to the state as a whole.<sup>2</sup>

The prob-  
lem of uni-  
form state  
laws

With forty-eight legislatures operating as so many separate laboratories or experiment stations, it is not surprising to find the same subjects, even those of the first importance, frequently dealt with in forty-eight different ways. In many instances, this diversity is not a bad thing, and in some instances it seems unavoidable. Whenever, for example, new problems suddenly arise and demand immediate legislative solution, each legislature is obliged to blaze its own way. Experience finally may show that one state has been peculiarly successful in dealing, for example, with workingmen's

<sup>1</sup> A highly entertaining study of legislative "resolutions" and "freak" bills is to be found in W. Seagle, "Be It Resolved," *Amer. Mercury*, X, 208-215 (Feb., 1927), and "The Laws We Escape," *ibid.*, X, 354-363 (Mar., 1927).

<sup>2</sup> Cf. H. H. B. Meyer, "A New Index of State Session Laws," *Amer. Polit. Sci. Rev.*, XXII, 121-127 (Feb., 1928).

compensation, or the sale of fire-arms, or get-rich-quick concerns; whereupon its laws on those subjects are extensively copied by sister states. But while in many instances the absence of uniform laws is a fact not to be deplored, there are numerous matters upon which a high measure of uniformity is not only desirable but of prime importance. For there is a broad legislative field of common interest to the people of all the states over which the federal government has no control, despite the remarkable expansion of its power over interstate commerce and other matters as described in earlier chapters.<sup>1</sup> The regulation of social and commercial relationships, for example, falls almost wholly to the separate states; and the absence of substantial uniformity would quickly lead—indeed, has already led in repeated instances—to confusion, and perhaps chaos. Laws governing the making and enforcement of ordinary business and insurance contracts obviously call for uniformity throughout the nation. Similar laws are needed also to prevent the legal tangles that arise in determining the status of individuals and the rights of property as affected by divorces and subsequent remarriages. When the same act is treated as a felony in one state, as a misdemeanor in another, and is not punishable at all in still other states, an argument may be advanced for uniformity in the definition of crimes.

The most effective agency at work to promote uniform enactments on all subjects where uniformity is deemed desirable and practicable is the National Conference of Commissioners on Uniform State Laws. This body is composed of commissioners (usually three) from each of the states, the District of Columbia, and each of the territories and major dependencies. In thirty-three of these jurisdictions, the commissioners are appointed by the governor, acting under express legislative permission; in the other jurisdictions, the appointments are made by the governor without definite legal authorization. The commissioners are lawyers of standing and experience, together with members of law-school faculties; and all serve without pay. Since the Conference began its work, about 1890, it has drafted and recommended to the states for adoption fifty-five "uniform acts." Some of these have now become obsolete, so that at present the commissioners are recommending a total of forty-four acts for separate state adoption. Progress toward uniformity through separate state action is necessarily slow; nevertheless, much has already been achieved in this manner. Fifty-two jurisdictions

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XXXIII

Commissioners on  
uniform  
state laws

<sup>1</sup> See especially Chaps. xxvii-xxviii above.

(all but one) have adopted the Negotiable Instruments Act; forty-eight jurisdictions, the Warehouse Receipts Act; twenty-five, the Veterans' Guardianship Act; thirty-one, the Sales Act; twenty-seven, the Bills of Lading Act; twenty-one, the Stock Transfer Act, and twenty, the Desertion and Non-Support Act.<sup>1</sup> But the adoption of perfectly uniform statutes by every state in the Union cannot ensure entire uniformity in the decisions of the state and territorial courts that have to interpret and apply these laws in specific cases. So that, under existing conditions, the most that can reasonably be hoped for is a greater approach to substantial, rather than complete, uniformity in dealing with such matters. Toward this goal we have been making slow, albeit noteworthy, progress during the past two or three decades.

#### The lobby

In an earlier chapter, attention was called to the regrettable absence of deep and sustained popular interest in the work of Congress.<sup>2</sup> The same popular indifference is perhaps even more noticeable in the case of our state legislatures; and essentially the same reasons may be offered in explanation. Special interests with selfish ends to serve, and well-meaning and public-spirited hobby-riders on the other hand, maintain no end of interest in legislative work. Often they descend upon the state capital, like a cloud of locusts, and exert an influence upon the legislative output quite as important and far-reaching as that of the congressional lobby. At all events, the lobby is probably everywhere the most powerful of all influences shaping state legislation. "The lobby" is a collective term applied to the people who undertake to persuade the members of the legislature to oppose or to support measures which are coming up for consideration; a man or woman who makes a practice of this sort of thing is called a "lobbyist," and the practice itself is known as "lobbying." The term need not imply the corrupt use of money, or indeed any improper motive or conduct. On

<sup>1</sup> The complete list of "uniform acts," and of the states that have adopted them, appears in the *Handbook of the National Conference of Commissioners on Uniform State Laws* (1929), 473-485. See also J. F. Ailshee, "Limits of Uniformity in State Laws," *Amer. Bar Assoc. Jour.*, XIII, 633-636 (Nov., 1927); W. M. Crook, "Uniform State Laws," *Texas Law Rev.*, IV, 316-333 (Apr., 1926); *Congressional Digest*, VI, 183-207 (June-July, 1927), series of articles on "The Question of a Uniform Marriage and Divorce Law"; H. M. Hargest, "Keeping the Uniform State Laws Uniform," *Univ. of Pa. Law Rev.*, LXXVI, 178-184 (Dec., 1927); E. M. Abbott, "Need for Uniform Reciprocal Criminal Laws," *Jour. Crim. Law and Criminol.*, XX, 582-587 (Feb., 1930).

<sup>2</sup> Chap. XXII above.

the contrary, it often happens that where the lobby is most industrious, numerous, and successful, corruption is wholly absent; lobbying is often of great educative value to legislators who are personally unacquainted with the merits or defects of pending bills. There are, in fact, two well-defined classes of lobbyists. The first consists of perfectly honorable men and women who adopt open-and-above-board methods of influencing members of the legislature.<sup>1</sup> The other is composed of the "harpies and vultures of politics," consisting usually of paid attorneys of corporations, and including many former members of the legislature who understand the inner workings of the legislative machinery. It is this second class, very largely representing special interests and employing means more or less corrupt, that gives the lobby a bad name; it is perhaps the chief cause of undesirable legislation and of the defeat of measures framed to promote the public well-being.

From the vantage point of one who has long been a student of government and has had much practical experience as a member of a state legislature, it is asserted that "the system of lobbying in legislative halls in America ought to be sharply scrutinized and modified. The lobbyist ought to be put under strict rules, and in the event of a clearly substantiated and deliberate misrepresentation made to a member of the legislature or any committee, or in the event of the use of deception and disingenuous methods, should be subject to the penalty of disbarment which a lawyer suffers when he misrepresents facts to a court. The modern lobbyist holds a more intimate relation to the course of legislation and to the ultimate effect of it than either the lawyer or the judge. The lobbyist is in a position to tamper effectively with law at its source. . . ."<sup>2</sup> Although some attempts have been made to regulate the lobbyist's activities by legislation in New York, Massachusetts, Wisconsin, and some other states, little has been accomplished; and this continues to be one of the numerous unsolved problems of American state government.<sup>3</sup>

<sup>1</sup> W. A. Boyce, Jr., "Women as Lobbyists," *Nat. Mun. Rev.*, XVI, 571-576 (Sept., 1927).

<sup>2</sup> F. M. Davenport (former member of the New York senate), "Impressions of a Modern Legislature," *Outlook*, CXXII, 286-292 (June 18, 1919).

<sup>3</sup> J. Quincy, "Regulation of the Lobby in Massachusetts," *Forum*, XII, 346-357 (Nov., 1891); M. Storey, "The American Legislature," *Albany Law Jour.*, L, 187-197 (Sept. 22, 1894); J. K. Pollock, Jr., "The Regulation of Lobbying," *Amer. Polit. Sci. Rev.*, XXI, 335-341 (May, 1927); P. S. Reinsch, *Readings on American State Government*, 79-84; R. Luce, *Legislative Assemblies*, Chap. xvii; Governor H. S. Johnson's *Message to the Eleventh Legislature of the State of Oklahoma* (1927), 24-27.

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## CHAPTER XXXIV

### THE STATE EXECUTIVE

To carry into effect public policy which has been enacted into law, and to perform other duties prescribed by the constitution and the statutes, two main groups of state offices are everywhere provided. The first usually consists of the offices of governor, lieutenant-governor, secretary of state, auditor or comptroller, treasurer, attorney-general, and superintendent of public instruction, which are regularly created by the constitution, and which are commonly called the state executive offices. The second consists of newer boards, commissions, and offices, established, as a rule, by statute, and usually known as the state administrative organs or agencies. Both groups exist for the same fundamental purpose, *i.e.*, to carry into effect public policy which has been embodied in law; and the distinction between them is not hard and fast. It is not unusual, for example, to speak of all the activities carried on by the non-legislative and non-judicial parts of the state government as "state administration." Nevertheless, it will make for clearness if we take account first of those offices that are essentially executive, and reserve the administrative services proper for treatment in the succeeding chapter.

Executive  
and admin-  
istrative  
offices

No one needs to be told that the most important executive officer of a state is the governor. Every colony in the days before the Revolution had a governor; and, notwithstanding popular dislike of the power which that official wielded, every one of the new state constitutions provided for a continuance of the office, albeit with authority considerably reduced.<sup>1</sup> The organized territories of later times had governors, and all carried the office over into their

The gov-  
ernor

<sup>1</sup> "It never occurred to our forefathers that there was a vast difference between a governor appointed by a king and a governor elected by the people. They never stopped to think that a governor who held his office at the will of the people would be apt to observe the interests of those who could work his political ruin. In their opinion, based upon previous experience, governors were inclined to act arbitrarily and contrary to the wishes of the people. Thus developed the early policy of granting little power to the executive departments of the government. . . ." W. F. Dodd, in *Constitutional Conventions in Illinois* (1920), 10.

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XXXIV

Election

new state organization as a matter of course. In only two of the colonies, as we have seen, was the governor elected, even indirectly, by the people; and in a majority of the original thirteen states choice was made by the legislature. The plan of popular election, however, gradually won its way, and nowadays it prevails in every one of the forty-eight states.<sup>1</sup> Candidates are nominated either in state-wide direct primaries in which every properly registered voter of each party is entitled to participate, or by state conventions made up of delegates selected by the members of each party in such subdivisions of the state as counties and congressional or legislative districts. Ordinarily, a plurality elects; although in a few states a majority is required. In the latter case, there is provision for choice by the legislature in the lack of a popular majority for any one of the candidates.

Qualifica-  
tions,  
salary, and  
term

All state constitutions require the governor to have certain qualifications. He must always be a citizen of the United States; and in all but a few states he must be at least thirty years of age. Usually he must have resided in the state for a period of five years. His compensation is either definitely fixed in the constitution or left to the discretion of the legislature. At the present time, salaries range from \$3,000 up to \$10,000 in five states,<sup>2</sup> \$12,000 in Illinois, \$18,000 in Pennsylvania, and \$25,000 in New York. In twenty-three states, the governor's term is fixed in the constitution at four years; in twenty-four states, at two years; while New Jersey elects every three years. The newer constitutions show a tendency to change from the two-year to the four-year term.<sup>3</sup> As a rule, the governor is eligible for immediate reelection, and for reelection any number of times; but in Indiana, Pennsylvania, and some other states he may not serve two consecutive terms.

Removal

The governor and other principal state officers may be removed by impeachment. But the power is seldom exercised, as is indicated by the fact that only twelve governors have ever been impeached. Five of these impeachments occurred in the South during the Reconstruction period: one governor was removed from office, one resigned to avoid removal, and in the other cases the charges were dropped. In the North, two governors were impeached during the same period, one being acquitted, and the other removed from

<sup>1</sup> Except in Mississippi, where popular election is combined with legislative action. See W. F. Dodd, *State Government* (2nd ed., 1928), p. 224.

<sup>2</sup> California, Massachusetts, New Jersey, Ohio, and West Virginia.

<sup>3</sup> South Carolina adopted a constitutional amendment in 1924 raising the governor's term from two to four years.

office for embezzlement of state funds.<sup>1</sup> The latest instances are the impeachments of Governor Sulzer of New York in 1913, Governor Ferguson of Texas in 1917, and Governors Walton and Johnson of Oklahoma in 1923 and 1929—all of whom were removed from office. In 1929, also, Governor Long of Louisiana was impeached, but before the trial had progressed far the case was dropped.<sup>2</sup> In twelve states, a new and more expeditious mode of removing principal state officers has been adopted in recent years, known as the "recall." This takes the form of a special election held after a petition has been signed by a specified number of voters asking for such an election, and after rival candidates have been placed in nomination. If one of the latter receives more votes than the governor or other official whose removal is sought, the incumbent is said to be "recalled," and the successful candidate succeeds to the office and serves out the unexpired term.<sup>3</sup> Down to 1931, only one governor, and only three other executive officials voted for by the people of an entire state, have been recalled.<sup>4</sup>

The recall

In case of the governor's death, resignation, removal, or absence from the state, the lieutenant-governor, in two-thirds of the states, succeeds to the office. This, however, is never true when the governor has been recalled; the successor is then the rival candidate who polled the highest popular vote at the recall election. When there is a vacancy in the lieutenant-governorship, or where that office does not exist, the succession follows some order which is laid down in the constitution or the statutes; the president of the senate usually succeeds, and after him the speaker of the house.

Although the legislature is the chief organ for the enactment of state laws, it is not the only part of the government that par-

<sup>1</sup> A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 334.

<sup>2</sup> On the Sulzer case, see *Amer. Year Book* (1913), 53-55; on the Ferguson case, see *Amer. Polit. Sci. Rev.*, XII, 111-115 (Feb., 1918); XXIV, 652-658 (Aug., 1930); on the Walton case, see *Southwestern Polit. Sci. Quar.*, IV, 319-332 (Mar., 1924); *Amer. Polit. Sci. Rev.*, XXIV, 648-652 (Aug., 1930); on the Johnson case, see *Literary Digest*, XCV, Dec. 24, 1927, pp. 6-7; *ibid.*, C, Feb. 9, 1929, p. 12; on the Long case, see *ibid.*, CI, June 1, 1929, pp. 10-11; *Southwestern Polit. and Soc. Sci. Quar.*, X, 359-388 (Mar., 1930). Cf. C. S. Potts, "Impeachment as a Remedy," *St. Louis Law Rev.*, XII, 15-38 (Dec., 1926); M. T. Van Hecke, "Impeachment of Governor at Special Sessions," *Wisconsin Law Rev.*, III, 155-169 (Apr., 1925).

<sup>3</sup> See pp. 871-874 below.

<sup>4</sup> Governor Frazier, the attorney-general, and the commissioner of agriculture in North Dakota, in 1921; and a member of the state public utility commission in Oregon, in 1922. See D. H. Carroll, "The Recall in North Dakota," *Nat. Mun. Rev.*, XI, 3-5 (Jan., 1922); J. D. Barnett, "Fighting Rate Increases by the Recall," *ibid.*, XI, 212-213 (July, 1922).



takes of that function. Some legislative authority is exercised in every state by what are called quasi-legislative boards or commissions, upon which has been conferred the right to issue ordinances or regulations having the force of law and applying to the operation of public utilities and other corporations, to the protection of the public health, and to a large variety of other matters.<sup>1</sup> But a far more important subsidiary agency in law-making is the governor. Indeed, as a factor in legislation he is scarcely second to the legislature itself; for, although his legal authority in this field is largely of a negative character, he is often able in various ways to exert much positive influence in determining both the form and the substance of the laws that are passed.

## 1. The veto

The desirability of giving the governor some official share in the formulation of the public will into law is practically everywhere recognized by granting him the veto power. Originally, the states bestowed this power grudgingly, or not at all; of the earliest state constitutions, only those of Massachusetts, New York, and South Carolina made provision for it.<sup>2</sup> Nowadays, however, it appears in every state except North Carolina; and it enables the governor to exert a tangible influence in legislation which is equivalent to not less than that of one-half of the legislature, with the single limitation that it can be employed only in the negative.

Before any bill passed by the legislature becomes a law it has to be submitted to the governor, and if he vetoes it, it fails unless the legislature passes it a second time by the requisite majority. The time allowed the governor for consideration of bills varies from state to state: during the legislative session, in eleven states he has only three days; in twenty-two states he has five days; in three states, six days; and in eleven states, ten days. If he fails either to approve or veto a bill within this period, it becomes law automatically. If, however, the legislature adjourns within this time, the bill, in twenty-one states, fails to become law unless the governor subsequently approves it; the governor thus has a "pocket veto," or veto by inaction, corresponding to that enjoyed by the president of the United States.<sup>3</sup> On the other hand, in Maine and five other states,<sup>4</sup> if the legislature adjourns within the period allowed for consideration, bills become law unless the governor returns them with his objections at the beginning of the next legislative session.

<sup>1</sup> U. G. Dubach, "Quasi-Legislative Powers of State Boards of Health," *Amer. Polit. Sci. Rev.*, X, 80-95 (Feb., 1916).

<sup>2</sup> See p. 73 above.

<sup>3</sup> See p. 303 above.

<sup>4</sup> Florida, Indiana, Mississippi, Nevada, and South Carolina.

Of more importance is the length of time allowed for the consideration of bills after the legislature adjourns; for the bulk of legislation is passed shortly before adjournment. In thirty-four states, the governor is given a definite time following adjournment, ranging from six to thirty days, in which to approve or disapprove measures that have been passed. In twenty-three of these states, bills become law unless the governor records his disapproval within a specified period. In the other states, notably California and New York, no bill becomes a law unless approved by the governor within that period. "In such states the governor sits after the close of the legislative session practically as a third chamber. He grants hearings to advocates and opponents of measures which have received legislative approval, refers legal and financial questions to his attorney-general or other advisers, and in general does what he can to determine for himself whether the measures proposed by the legislature should be enacted."<sup>1</sup>

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XXXIV

The size of the vote required in the legislature to overcome the governor's veto also varies: in Connecticut, a mere majority of a quorum in each house suffices, and in seven other states a majority of the full membership is adequate;<sup>2</sup> in five states, a three-fifths vote is required;<sup>3</sup> elsewhere a two-thirds vote is necessary, based, in twelve states, on the number present, and in the remaining twenty-two, on the total membership.

Bills  
passed  
over the  
veto

The scope of the veto power, likewise, differs. In nine states, every bill must be accepted or rejected as a whole, even though some parts of it may be deemed good and others bad. In the case of appropriation bills, this has often resulted in forcing the governor to accept an entire measure, including items unnecessarily large or for unworthy projects, or else to veto the entire bill and thus perhaps delay indefinitely the voting of necessary funds for carrying on the state government. In such a situation, most governors have preferred to accept the former alternative. To enable the governor to check the common legislative tendency toward wastefulness, extravagance, and expenditures for purely local objects, all but nine of the states have now conferred upon him the right to veto separate items in appropriation bills. In Pennsylvania and a few other states, this has been construed to permit the governor

Extent of  
the veto  
power

<sup>1</sup> A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 318.

<sup>2</sup> Alabama, Arkansas, Indiana, Kentucky, New Jersey, Tennessee, and West Virginia.

<sup>3</sup> Delaware, Maryland, Nebraska, Ohio, and Rhode Island.

not only to strike out separate items, but to reduce the amount of any item. This latter development may work out badly, as it has done in Pennsylvania, where the legislature has been able to gratify local constituencies by voting appropriations far in excess of the estimated revenues of the state, thus transferring to the governor the burden of whittling down the appropriations and of shouldering whatever local unpopularity may result.<sup>1</sup> Two states, Washington and South Carolina, have gone so far as to permit the veto of any section or sections of any bill passing the legislature; elsewhere, non-appropriation bills must be accepted or rejected as a whole.

"Grading the states according to the apparent strength of the veto provisions in their constitutions, the first rank would be given to New York, Pennsylvania, Missouri, California, and Colorado. In each of these states the governor may veto items in appropriation bills, he has ten days for the consideration of bills during the session of the legislature, and thirty days at the close of the session, and a two-thirds vote of the total membership of each house is required to pass a measure over his objections. At the other end of the list, the states where the veto power appears to be the most restricted are Connecticut, Indiana, and Tennessee. In none of these can the governor veto appropriation items;"<sup>2</sup> the time for consideration of measures is only three or five days; and a majority vote is sufficient to override a veto.

The extent to which use is made of the veto depends upon the political and personal relations between the governor and the legislature, and especially upon the nature of the veto power itself. Vetoes are naturally most numerous in those states in which it is possible to disallow separate items in appropriation bills; in 1915, there were almost ten times as many vetoes in those states in proportion to the total number of bills passed as in the states where the veto is more restricted. In the one group, the veto was applied to the whole or to parts of about one measure in seven; in the other, to only about one bill in seventy. Altogether, more than a thousand separate bills or parts of bills were vetoed in that year. The largest number was in California, with 225 out of 996 bills

<sup>1</sup> R. H. Wells, "The Item Veto and State Budget Reform," *Amer. Polit. Sci. Rev.*, XVIII, 782-791 (Nov., 1924); A. Reppy, "The Power of the Executive to Split an Item of an Appropriation Bill," *Texas Law Rev.*, IV, 182-207 (Feb., 1926).

<sup>2</sup> J. A. Fairlie, "The Veto Power of the State Governor," *Amer. Polit. Sci. Rev.*, XI, 484 (Aug., 1917). Connecticut adopted the item veto in 1924, and Wisconsin in 1930.

passed; Pennsylvania, with 211 out of 1,003 bills; and New York, with 233 out of 980 bills. On the other hand, in Rhode Island there were no vetoes, and there was only one in each of four other states. In only five states were any bills or parts of bills reënacted after the governor vetoed them; these numbered only twenty-two, or about two per cent, out of a total of 1,066 votes.<sup>1</sup> In 1923, when forty-four legislatures were in session, the veto was applied to about 1,100 entire measures, or about seven per cent of the total number passed, and to about 1,000 parts of bills, mostly items in appropriation bills. "The governor of California disapproved 411 measures out of a total of 890 acts passed by the legislature, and he also vetoed or reduced 49 items of appropriations. In New York, 196 bills out of 1,098 and 18 items, and in New Jersey, 78 out of 251 bills, were the objects of executive disapproval. At the other extreme there were two vetoes in Florida and Vermont, three in Massachusetts, and four in Iowa."<sup>2</sup> The governor's veto was overridden in only 104, or nine per cent, of the cases where entire acts had been vetoed, and in only 40, or about four per cent, of the instances when items had been disapproved. Most of the unsuccessful vetoes occurred in four states—Kansas, Maine, New Jersey, and Ohio—where a pronounced lack of harmony existed between the governor and the legislature.<sup>3</sup>

The full effectiveness of the veto is even greater than is indicated by the large number of bills vetoed and the small number passed a second time. A mere hint from the executive office that a veto may be expected if a certain bill passes is often sufficient to kill it; and frequently something more than a hint to this effect is forthcoming. The possibility of a veto often impels members of the legislature to ascertain what the governor's attitude is likely to be before they even introduce a measure which they have in mind. Furthermore, in informal conferences with members of the legislature, or in more formal committee hearings, the governor may suggest amendments which must be made in order to render a bill satisfactory to him. Not infrequently, also, a veto message points out specific objections to certain parts of a bill, and new bills are introduced and passed with the objectionable feature omitted or amended. In such ways, the governor's power in legislation, which in law is of a purely negative character, may be

Indirect  
effects of  
the veto  
power

<sup>1</sup> Holcombe, *op. cit.* (1913), 327-328. In Illinois, only two bills have been passed over the governor's veto since the adoption of the present constitution in 1870.

<sup>2</sup> A. N. Holcombe, *op. cit.* (2nd ed., 1926), 316.

<sup>3</sup> *Ibid.*, 317.

transformed, without changing a letter of the constitution, into a positive, affirmative, influence; although it should be added that Alabama, Virginia, and Massachusetts have inserted in their constitutions provisions which definitely authorize the governor to propose amendments to bills which might otherwise incur a veto. Obviously, executive influence of this kind can be exerted only upon bills which are considered some time in advance of the close of a session; it does not affect the great number of bills regularly put through on the eve of adjournment. None the less, possession of the veto has incalculably strengthened the arm of the governor whenever he has undertaken to exercise an affirmative influence upon legislation by taking the lead in initiating and putting through a legislative program which is demanded or approved by intelligent public opinion.<sup>1</sup>

But the real starting point for this positive or affirmative influence of the governor upon legislation is to be found in his right to call special sessions of the legislature and to send formal messages to the two houses whenever they are in session. In about half of the states the legislature, when convened in special session, may consider only the subjects which have been included in the governor's call. Hence, by specifying certain topics in his summons, the governor may practically compel the legislature to consider these matters and to put itself more or less fully on record concerning them.<sup>2</sup>

2. Special  
sessions of  
the legisla-  
ture

### 3. Messages

Every state constitution likewise contains a clause requiring the governor to inform the legislature from time to time, by messages and addresses, upon the condition of state affairs.<sup>3</sup> Like similar

<sup>1</sup> See J. A. Fairlie, "The Veto Power of the State Governor," *Amer. Polit. Sci. Rev.*, XI, 473-493 (Aug., 1917); N. H. Debel, "The Veto Power of the Governor in Illinois," in *Univ. of Ill. Studies*, VI, Nos. 1-2 (1917); J. A. Swisher, "The Executive Veto in Iowa," *Iowa Jour. Hist. and Polit. Sci.*, XV, 155-213 (Apr., 1917); K. E. Carlson, "The Exercise of the Veto Power in Nebraska," *Univ. of Neb. Hist. and Polit. Sci. Ser.*, Bull. No. 12 (1917).

<sup>2</sup> Cf. M. T. Van Hecke, "Legislative Power at Special Sessions," *Cornell Law Quar.*, IX, 447-462 (June, 1924). Oklahoma adopted a constitutional amendment in 1923 empowering the legislature to convene in special session upon a call signed by a majority of the members of the lower house. Subsequently the amendment was declared invalid by the state supreme court. *Simpson v. Hill et al.* (1927), 263 Pacific 635-645 (1928). A. J. Lien, "Convening the Special Session—Oklahoma's Predicament," *Nat. Mun. Rev.*, XVII, 139-141 (Mar., 1928).

<sup>3</sup> Recent messages of the governors of the several states are summarized in *Amer. Polit. Sci. Rev.*, XVI, 276-284 (May, 1922); *ibid.*, XVII, 231-260 (May, 1923); *ibid.*, XVIII, 296-305 (May, 1924); *ibid.*, XIX, 309-324 (May, 1925); *ibid.*, XX, 330-339 (May, 1926); *ibid.*, XXI, 318-335 (May, 1927); *ibid.*, XXII, 637-649 (Aug., 1928); *ibid.*, XXIII, 410-417 (May, 1929); *ibid.*, XXIV, 380-392 (May, 1930); *U. S. Daily, Supp.*, Feb. 16, 1931.

communications of the president to Congress, these messages are not infrequently addressed over the heads of the legislators to the people at large, in the hope of creating public sentiment that will compel the legislature to enact measures which otherwise it might be reluctant to pass. By restricting his messages to a few definite recommendations embodying policies which his party has endorsed in its platform, or policies for which he is individually willing to assume responsibility,<sup>1</sup> the governor may become an influence of prime importance in shaping legislation; and he is the more likely to do so if he takes the trouble to have bills drafted incorporating his recommendations. He need never fail to find some member of the legislature who will be willing to introduce the measures thus prepared; and it sometimes happens, as in the Illinois legislature of 1913,<sup>2</sup> that bills thus originating with the governor or executive departments are given a specially favored position upon the legislative calendar. Whether the governor's recommendations or bills receive favorable consideration depends largely upon his tactfulness, his persuasiveness in winning over members and party leaders, the extent of the popular support back of his measures, and, not infrequently, the vigor with which he wields the veto and uses the patronage at his disposal as clubs to compel the reluctant support of some members. Naturally, his power will go farther, too, if his own party has a majority in the two houses.

The rapid spread of the movement for state budgetary reform has considerably enhanced the legislative influence of the governor. A large majority of the states which have recently adopted improved budgetary methods have recognized both the appropriateness and the importance of assigning to the governor the leading part in the preparation of the state budget. No other official or group of officials can perform this work so satisfactorily; the governor is held responsible for the economical and efficient conduct of the state government, and is in a position to know more intimately than any other state official the needs of the various administrative branches and state institutions. Upon him, therefore, or upon some officer directly responsible to him, has rightfully been imposed the duty of collecting from the various departments and institutions estimates of their needs for the ensuing fiscal period,

4. Budget  
making

<sup>1</sup> Indiana experience shows that the recommendations of the governor have more frequently been enacted by the legislature than measures recommended in party platforms. See B. Y. Berry, "The Influence of Party Platforms on Legislation in Indiana," *Amer. Polit. Sci. Rev.*, XVII, 51-70 (Feb., 1923).

<sup>2</sup> *Ibid.*, VII, 239 (May, 1913).

of revising these estimates, of forecasting the probable revenues of the state and the amounts required to be raised by taxation, and of submitting this information to the legislature in good form as a basis for intelligent action by that body.<sup>1</sup>

Notwithstanding the theory of separation of powers on which our state governments are based, the public has, in the past twenty years, come to look more and more upon the governor as a legislative leader and to hold him responsible for having, and for putting through, a definite program of legislation, very much as the country at large has come to hold the president responsible for getting legislation through Congress.<sup>2</sup> The governor, however, is always handicapped in his legislative leadership, as is the president, by the practical restriction of his direct contact with the legislature to personal interviews, and by being obliged to entrust the explanation and defense of his measures in each house to some member thereof. Manifestly, his influence as a leader in law-making would be much increased, and a greater degree of harmony and coöperation between the executive and legislative branches would be attained, if the governor and the heads of executive departments were given the right to introduce bills on their own responsibility and to sit in the legislature, although without a vote. This arrangement would carry with it the privilege of explaining and defending their recommendations and bills, and

<sup>1</sup> For the effect of the movement for budget reform upon the governor's veto, see *Amer. Polit. Sci. Rev.*, XVIII, 782-791 (Nov., 1924). Budget reform will be considered further in Chap. xxxvi below.

<sup>2</sup> Woodrow Wilson gave clear expression to his view of the governor's function as legislative leader soon after his election as governor of New Jersey. The leaders of his party in the legislature had called a conference to consider a legislative program, and Mr. Wilson attended without being invited. His presence precipitated a debate over the propriety of the governor's taking part in such a conference. Finally Mr. Wilson rose and said: "Gentlemen, I have been elected governor of New Jersey by the people of New Jersey, selected by the convention of the Democratic party, and I thereby have become the responsible leader of the Democratic party in the state. I will be held responsible by the people at the polls. I will be held responsible for the administration of the affairs of the state of New Jersey. Each of you gentlemen will be held responsible in the districts where you are elected. I am held responsible as well as you by the same people. I am the only person in the whole state, however, to express approval or disapproval on behalf of all the people, and I will express that approval or disapproval for the people by determining what we should do." The governor then laid before the conference a comprehensive program of legislation, and remained on his feet nearly three hours arguing and answering questions; with the result that the conference unanimously adopted his program, and within a short time the measures were enacted into law. David Lawrence, in Springfield (Mass.) *Republican*, February 29, 1924. See also J. M. Mathews, "The New Role of the Governor," *Amer. Polit. Sci. Rev.*, VI, 216-228 (May, 1912).

would afford them opportunity to impart first-hand information and to answer any questions that might arise in the course of debate. Thus far, the only important step taken in this direction was the inclusion in the budget amendment to the New York constitution, adopted in 1927, of a provision authorizing the governor and heads of departments to appear before the legislature and be heard on any matter pertaining to the budget.<sup>1</sup> If, however, we continue to hold the governor responsible for putting through a legislative program—as we probably shall—we cannot fairly deny him direct and public access to the law-making body, although this innovation may have to await, in most states, the action of a constitutional convention or the adoption of a popularly initiated amendment. But, once the plan is tried, its rapid spread among the states, either by constitutional amendments or by the voluntary action of the legislatures themselves, may be predicted with some degree of confidence. With a view to strengthening the position of the governor as legislative leader and preventing deadlocks between the governor and the legislature, it has been proposed that the chief executive be given the right to order a popular referendum upon measures which he has recommended, and which fail to pass the legislature.<sup>2</sup>

Thus far, our attention has been fixed upon the governor's relations with the law-making branch. His position as chief executive, however, calls equally for attention; after all, his primary function is executive. The first thing to be observed in this connection is that, although commonly charged with the duty of seeing that the laws are faithfully executed, the governor enjoys little or no inherent authority derived from the mere fact that he is the chief executive of the state. His position in relation to the state admin-

Executive  
powers

<sup>1</sup> This amendment is reprinted in A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 602-603.

<sup>2</sup> The "model state constitution" proposed by the National Municipal League provides that the governor may order such a referendum upon *any* bill which fails to pass the legislature if it received the support of one-third of the members. It is also provided that a majority in the legislature may order a referendum upon bills which have been vetoed by the governor, but which fail of re-passage although supported by a majority (§ 27, and pp. 26-27). A still more radical suggestion is that the governor be permitted, in cases of disagreement over important subjects of legislation, to dissolve the legislature and appeal to the voters for the election of a new legislature more in harmony with his program, much as the English prime minister is able to bring about a dissolution of the House of Commons, followed by an appeal to the country for a popular mandate. See F. W. Coker, "Interworkings of State Administration and Direct Legislation," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXIV, 122-133 (March, 1916).



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character

istration is therefore distinctly inferior to that of the president in relation to the national administration. The federal constitution broadly bestows "*the executive power*" of the United States upon the president; but no corresponding clause in state constitutions concentrates executive power in the governor, giving him an indefinite sphere of executive influence. On the contrary, the executive authority in state government is shared by a number of officers. State constitutions frequently say expressly that the executive branch of the government shall consist of the governor, lieutenant-governor, and various other officers mentioned by title; and that merely the "supreme" (or chief) executive power belongs to the governor. Such provisions, combined with the tendency of the courts to construe grants of power in state constitutions rather narrowly, have left the governor with practically no executive authority which is not clearly granted by some definite provision in the constitution or by some statute.<sup>1</sup>

Dependence  
upon subor-  
dinates

In carrying out the constitutional mandate to see that the laws are faithfully executed, the governor is obliged to rely upon a great number of subordinates, chiefly the state executive officers (generally chosen by popular vote), the locally-elected sheriffs, prosecuting attorneys, and city officials, and the judges of the various state courts. In order that the governor may fully and effectually obey the constitutional injunction, it is essential (1) that he be given a free hand in the selection of these subordinates; (2) that he be able to supervise and direct them in the performance of their duties; and (3) that he be empowered to suspend or remove an official who proves incompetent or unfaithful. Unfortunately, in no state is the governor given any such full and effective means of control over these law-enforcing agencies. On the contrary, he enjoys a very limited power of appointment, a wholly inadequate power of supervision and direction, and a narrowly restricted right of suspension and removal.

The power  
of appoint-  
ment

The appointing power of the governor is derived both from the constitution and from statutes. In the former, there is commonly a clause specifying certain officers whom the governor may appoint; but in most instances his constitutional appointing power is derived from a general clause authorizing him to appoint all officers whose appointment or election is not otherwise provided for. To other positions he appoints by virtue of direct legislative

<sup>1</sup> W. F. Dodd, *State Government* (2nd ed., 1928), Chap. VIII; J. M. Mathews, *American State Government*, Chaps. VIII, xv.

authorization. The number of places which the governor may fill runs well into the hundreds in such states as New York, Pennsylvania, and Illinois; and it always tends to increase whenever the governor and the majority in the legislature belong to the same party, and tends to decrease whenever they belong to different parties.

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However broad the governor's power of appointment, it seldom extends to the most important executive officers, commonly called the heads of departments, such as the secretary of state, the attorney-general, the treasurer, the auditor or comptroller, and the superintendent of public instruction. These officials are usually elected by the people,<sup>1</sup> a practice which has been characterized as "a relic of the outworn idea that one-man power is dangerous, and that the heads of departments, instead of being the effective instrumentalities of the governor, should be checks upon him." That there should be some check upon the governor is perhaps true. But it should come from the other departments of the government, and from his responsibility to the people, and not from officers in his own department.<sup>2</sup>

Chosen independently of the governor, and for fixed terms, these principal executive officers may fail to coöperate with their nominal chief, and are then in a position to embarrass him and to impair the efficiency with which the state's affairs are administered. Especially is this likely to be the case when one (or more) of these officers belongs to a different political party, or to a different faction in the same party, from that of the governor. When all belong to the same party, the friction which inevitably tends to arise between officers who are legally independent of the governor and of each other may be avoided or greatly reduced and some measure of team-work ensured through the harmonizing influence of party fellowship. Having their duties almost wholly prescribed by law, these state officials nowhere occupy the same relation of subordination toward the governor that the heads of the national executive departments occupy with respect to their chief; they never constitute a body of legal and political advisers to the governor corresponding to the president's cabinet.

By far the greater part of the governor's appointing power arises in connection with the statutory boards and commissions

Limitations  
on the  
appointing  
power

<sup>1</sup> In Maine, the governor and auditor, and in New Hampshire, New Jersey, and Tennessee, the governor, are the only state executive officials elected by the voters of the entire state.

<sup>2</sup> J. M. Mathews, *Principles of American State Administration*, 84.

which have appeared everywhere in great numbers in recent decades. In filling these administrative offices, however, the governor seldom has a free hand; for the most important positions he must obtain confirmation of his appointments by an executive council<sup>1</sup> or, more commonly, by the state senate—a requirement which is open to many of the objections which have been cogently urged against councilmanic confirmation of appointments by the mayor in our cities.<sup>2</sup> Other limitations, too, impair the effectiveness of the appointing power as a means of control over administrative officials, *e.g.*, civil service laws, laws prescribing specific qualifications for appointees, and especially laws fixing definite and overlapping terms, which often make it impossible for the governor to appoint a majority of the members of a board or commission during a single term in office. All of these provisions more or less restrict the governor's choice of the officials whose duty is to assist him, directly or indirectly, in the enforcement of the laws, and therefore tend to weaken his control over them. On the whole, the governor's power of appointment, especially where subject to senatorial confirmation, has not contributed materially to strengthen his position as the head of the state administration; often it has been a positive source of weakness.

The powers  
of direc-  
tion and  
removal

The governor's control is further lessened by the fact that he has little or no power of direction over the other executive and administrative officials, the reason being that in most states the conduct of administration is prescribed by law "with infinite and not always intelligible detail." Whatever power of direction he enjoys must ordinarily be derived from a specific grant in the constitution or the statutes; and a commendable tendency has recently appeared in some states to increase his authority in this respect. Of much greater potential importance, as an agency of control, is the governor's power to suspend or remove appointive officials; although this, too, is quite insignificant in comparison with the president's power of removal. Like the power of direction, the power of removal must generally be derived from some specific grant of authority in the constitution or statutes. Furthermore, the exercise of this power, when authorized, is often so hedged about as to be very ineffective.<sup>3</sup> The principal elective state officials can,

<sup>1</sup> Executive councils exist only in Maine, New Hampshire, and Massachusetts.

<sup>2</sup> See Chap. XLII below.

<sup>3</sup> A. F. MacDonald, "The Governor and the Public Service Commission of Pennsylvania," *Nat. Mun. Rev.*, XV, 185-186 (Mar., 1926).

as a rule, be removed only by the cumbersome process of impeachment. Even when the governor is authorized to remove or suspend them, an effective check upon the exercise of the power is imposed in a number of states through the requirement that removals must have the approval of the senate. In New York, for example, the principal elective state officials can be removed only by a two-thirds vote of all the members elected to the senate, a requirement which more than once has served seriously to embarrass the governor. Over local officers the governor has, in most states, little or no control; although in New York, Michigan, Minnesota, Ohio, and Wisconsin he can remove certain of them.<sup>1</sup>

In addition to the legislative and executive powers here considered, the governor is clothed with certain miscellaneous powers, such as the control of the state militia, the granting of pardons and reprieves,<sup>2</sup> and the calling of special elections to fill vacancies. He is also an *ex-officio* member of a large number of state boards and commissions, and is the medium through which official communications are carried on with other states and with the national government. Unfortunately, most of the governor's time is consumed in the performance of comparatively trifling ministerial duties, instead of being devoted to an intensive study of the big problems in the fields of legislation and administration. A recent governor of New York testified that he was compelled to spend approximately seventy-five per cent of his time doing clerical work, signing papers, and listening to reports, matters which might well have been delegated to a competent subordinate.<sup>3</sup>

Miscel-  
laneous  
powers

A lieutenant-governor is provided for in thirty-five state constitutions.<sup>4</sup> In general, his functions are (1) to succeed the governor in the event of the latter's death, removal, absence, disability,

The  
lieutenant-  
governor

<sup>1</sup> See W. H. Edwards, "Governor Donahey and the Ohio Mayors," *Nat. Mun. Rev.*, VIII, 350-356 (June, 1924).

<sup>2</sup> J. D. Barnett, "The Grounds of Pardon," *Jour. Crim. Law and Criminol.*, XVII, 490-530 (Feb., 1927); M. T. Van Hecke, "Pardons in Impeachment Cases," *Michigan Law Rev.*, XXIV, 657-673 (May, 1926); E. Morris, "Some Phases of the Pardoning Power," *Amer. Bar Assoc. Jour.*, XII, 183-190 (Mar., 1926). During Mrs. Ferguson's term as governor in Texas (1925-27), 3,737 pardons were granted, an average of more than five a day.

<sup>3</sup> Alfred E. Smith, "How We Ruin Our Governors," *Nat. Mun. Rev.*, X, 277-280 (May, 1921).

<sup>4</sup> The states that have no lieutenant-governor are Arizona, Arkansas, Florida, Georgia, Maine, Maryland, New Hampshire, New Jersey, Oregon, Tennessee, Utah, West Virginia and Wyoming. In four of these (Arizona, Oregon, Utah, and Wyoming), the secretary of state succeeds to the governorship; elsewhere the succession passes to the president of the senate or the speaker of the house.

or impeachment; and (2) to preside over the deliberations of the senate, and incidentally to have a casting vote in case of a tie (except in Michigan). In some states, he has the right to participate in senate debates, to vote when the senate is in committee of the whole, and to serve *ex-officio* as a member of the governor's council. On the whole, the office, when not useless, is unimportant; and the thirteen states that have no lieutenant-governor have not experienced any resulting inconvenience.<sup>1</sup>

Space permits only the briefest summary of the duties of the other principal executive officers.<sup>2</sup> There is always a secretary of state, or secretary of the commonwealth, who is the custodian of the state archives and the state seal. He also has charge of the publication of the laws, countersigns the proclamations and commissions issued by the governor, issues certificates of incorporation to corporate bodies of various kinds, has important duties in connection with primaries and elections, and performs a great variety of miscellaneous duties. The secretary is elected by popular vote except in Delaware, Maryland, New Jersey, Pennsylvania, Texas, New York, and Virginia, where he is appointed by the governor; and in Maine, New Hampshire, and Tennessee, where he is chosen by the legislature.

The state treasurer is merely the custodian of the revenues and trust funds of the state,<sup>3</sup> which he pays out for objects authorized by law, but only upon the order of the auditor or comptroller. Treasurers are chosen by the legislatures of Maine, Maryland, New Hampshire, New Jersey, and Tennessee, and appointed by the governor in New York and Virginia; but everywhere else they are elected by popular vote.

The auditor or comptroller (found in all but three states) has much greater power than the treasurer, for he not only audits the accounts of all state officers charged with the collection or disbursement of state funds, but passes in the first instance upon the legality of all expenditures. No money may be drawn from the public treasury without warrant previously issued by him. He is elected by popular vote except in New Jersey, Tennessee, and Vir-

<sup>1</sup> The office is omitted in the Model State Constitution. See C. Kettleborough. "Powers of the Lieutenant-Governor," *Amer. Polit. Sci. Rev.*, XL, 88-92 (Feb., 1917); and *Nat. Mun. Rev.*, X, 403, 409-410 (Aug., 1921), "Why a Lieutenant-Governor?" and "How to Save Our Governors from Ruin."

<sup>2</sup> These are more fully discussed in J. M. Mathews, *Principles and Methods of American State Administration*, Chap. vi, and W. F. Dodd, *State Government* (2nd ed., 1928), Chap. viii.

<sup>3</sup> M. L. Faust, *The Custody of State Funds* (New York, 1925).

ginia, where he is chosen by the legislature. In Oregon and Wisconsin, the secretary of state is *ex-officio* auditor; and in New Hampshire, warrants on the treasury are drawn by the governor, who annually appoints a committee of the executive council to audit the accounts of the state treasurer.<sup>1</sup>

The superintendent, or commissioner, of public instruction has charge of the general educational interests of the state. He supervises the administration of the school laws, apportions the school funds among cities, townships, or school districts, conducts investigations, and makes reports to the governor and legislature concerning the public school system of the state. Superintendents are elected by popular vote in thirty-two states, but appointed by the governor in eight, and by state boards of education in eight.

The attorney-general, as the principal law officer of the state, prosecutes and defends all actions in which the state has a direct interest, gives legal advice to the governor and other principal state officers, and in some instances exercises supervision over the work of the county prosecuting attorneys. In New Jersey, New Hampshire, and Pennsylvania, the attorney-general is appointed by the governor; in Maine, by the legislature; in Tennessee, by the supreme court; elsewhere he is chosen by popular election.

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<sup>1</sup> J. M. Mathews, *Principles of American State Administration*, 146-147.

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- H. J. Ford, "Recent Tendencies in American Politics," *ibid.*, XIV, 1-13 (Feb., 1920).
- H. F. Kumm, "Mandamus to the Governor in Minnesota," *Minnesota Law Rev.*, IX, 21-53 (Dec., 1924).
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## CHAPTER XXXV

### STATE ADMINISTRATION

We have seen that one of the most striking developments in government in recent times is the multiplication of activities undertaken, and the consequent expansion of administrative machinery.<sup>1</sup> Nowhere is this phenomenon more in evidence than in the American states; and in turning to consider how state administration is organized and carried on we may well fix attention mainly upon the extent of this expansion, the reasons for it, the results of it, the disadvantages which it entails, and some of the efforts which are being made to overcome them.

Growth of  
adminis-  
trative  
agencies

State government in earlier days was a simple affair; a half-dozen principal officers, with small staffs of deputies or other assistants, met all executive and administrative needs. After the middle of the nineteenth century, however, functions began to be broadened, and from 1890, and especially 1900, virgin fields of investigation and control were rapidly occupied. In some instances, the new machinery required was provided for in constitutional amendments, but in most cases it was created by statute; and the establishment of statutory boards and commissions became easily the most notable feature of state administrative development. From 1900 to 1909 inclusive, the number of boards, commissions, and other agencies created by the legislatures throughout the country averaged between one and two hundred a year; and although the tendency to establish new offices has recently been curbed somewhat, hardly a legislative session passes in any state without the authorization of at least one new administrative body. In 1913, the legislatures of thirty-five states created no less than 236, and in 1915 about 170, new agencies; only five legislatures in each of these years failed to establish at least one. Until very recently, hardly a state could be found which did not have at least two score of these administrative bodies or offices, while in Texas the number was 91 (1925), in Pennsylvania, 105 (1923), in California, 112 (1919),

<sup>1</sup> See p. 620 above.



in Delaware, 117 (1918), in Illinois, about 130 (1917), in New York, 187 (1919), and in Massachusetts, 216 (1919).<sup>1</sup>

The reasons for this development are not far to seek. Some of the new agencies were created originally for the purpose of collecting and digesting information for the legislature as a basis for intelligent law-making on some highly complicated subject. Others have originated in a desire on the part of the legislature to evade or postpone the solution of some important question, which, therefore, has been turned over to a special board or commission.<sup>2</sup> Not a few offices have been created mainly or solely with a view to increasing the "spoils" to be distributed as rewards for party services. Again, citizens interested in some project of reform urge the undertaking of new work by the state government; and, instead of studying the existing machinery in order to determine whether the new function might not be properly handled by an existing office, they draw up a statute creating a new agency, and the legislature obligingly passes it. Popular demand for more industrial and social-welfare legislation, and for more activity by the state government in promoting agriculture, has been especially productive in this way. A number of new boards and offices, too, spring from the increasing tendency of the state in recent years to assume functions which originally were left to county, city, or town authorities. Lastly, the growth of insurance, banking, and other financial corporations, and of railways and other public service companies, together with the breakdown of the numerous attempts to regulate them by detailed legislative enactments, has resulted in creating boards or commissions in almost every state for the administration of laws designed to regulate such business enterprises. The establishment of these newer administrative agencies has in many instances had the very beneficial effect of securing the advantages of specialization in public affairs and the application of technical knowledge and skill to the regulation of complex social and industrial conditions.<sup>3</sup>

<sup>1</sup> L. A. Blue, "Recent Tendencies in State Administration," *Annals Amer. Acad. Polit. and Soc. Sci.*, XVIII, 434-445 (1901); F. H. White, "The Growth and Future of State Boards and Commissions," *Polit. Sci. Quar.*, XVIII, 631-656 (Dec., 1903); J. S. Pardee, "Government Running Wild," *Outlook*, CXI, 618-622 (Nov. 10, 1915); H. J. Ford, "Reorganization of State Governments," *Acad. of Polit. Sci. Proceedings*, III, 30-36 (1913).

<sup>2</sup> "Legislative Investigations," *Amer. Polit. Sci. Rev.*, XIV, 277-286 (May, 1920); *ibid.*, XVI, 650-658 (Nov., 1922); *ibid.*, XVIII, 553-559 (Aug., 1924).

<sup>3</sup> Some of the new state functions partake more of the nature of business enterprises than of government, notably as they have been developed in North Dakota. See H. Gaston, *The Non-Partisan League* (New York, 1920); C. E.

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Reasons  
for the  
increase

Once created—under whatever circumstances—each board or office has shown a tendency to magnify the importance of its activities, and to compete ever more successfully for appropriations for the continuance of its work. As a result, the administrative machinery of most of the states has come to embrace vigorous and more or less costly agencies having to do with each of the following main groups of interests and activities: (1) the enforcement of regulatory laws affecting banks and other financial institutions, insurance companies,<sup>1</sup> railroads, express companies, telephone, telegraph, lighting, street-railway, and other public utilities; (2) sanitation and public health protection; (3) the enforcement of laws regulating the employment of women and children in industry, requiring proper sanitary arrangements and safety devices in industrial and mercantile establishments, and governing the administration of workmen's compensation and industrial insurance laws and laws for the prevention and adjustment of labor disputes; (4) the supervision and coördination of the work of poor relief in cities, towns, villages, and counties, and the oversight and control of state institutions for the care of the insane, blind, deaf and dumb, and of state prisons and reformatories; (5) the supervision of public educational activities;<sup>2</sup> (6) the assessment and collection of taxes, and the supervision, in some states, of the financial operations of certain units of local government; (7) the regulation of various callings and professions; (8) the organization and control of the state militia, and of the state police force in about a dozen states;<sup>3</sup> (9) the development of better methods of raising and marketing crops, the breeding of improved grades of stock, and the general encouragement of rural industry and the enrichment

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XXXV  
Principal  
groups of  
adminis-  
trative  
activities

Russell, *The Story of the Non-Partisan League* (New York, 1920); A. A. Bruce, *The Non-Partisan League* (New York, 1921); P. R. Fossum, "The Agrarian Movement in North Dakota," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XLIII (1925). Not a few other states, however, regarded as business concerns, own more property and employ more men and pay out more for labor and materials than any other enterprise operating wholly within their boundaries.

<sup>1</sup> E. W. Patterson, *The Insurance Commissioner in the United States* (Cambridge, 1927).

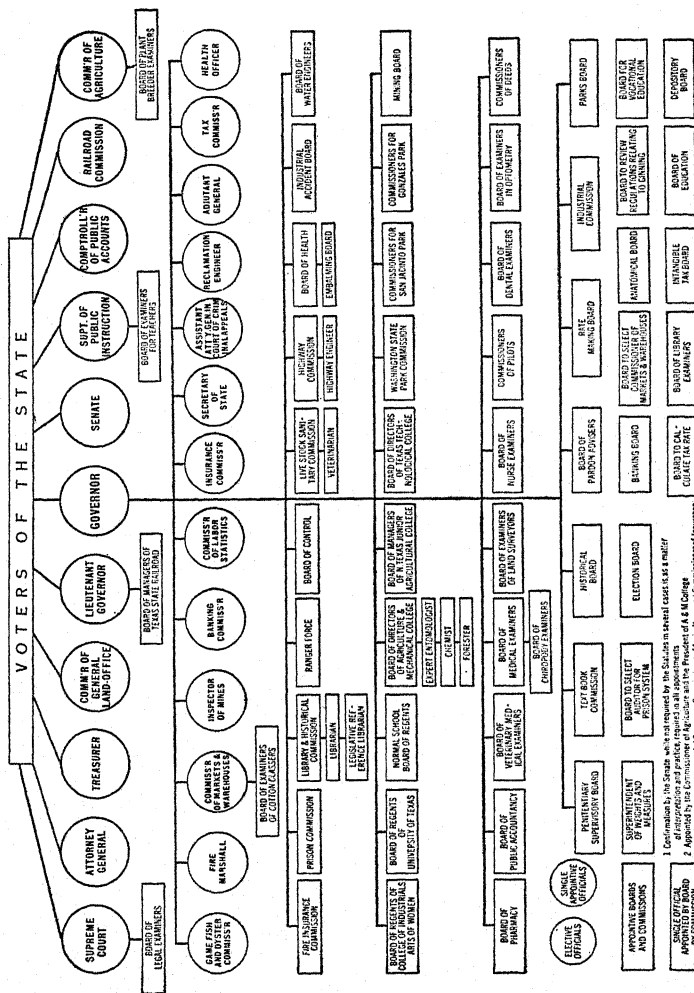
<sup>2</sup> W. A. Cook, *Federal and State School Administration* (New York, 1927). Cf. C. C. Maxey, "Higher Education in the Cockpit—Is the State University Part of the Government?," *Nat. Mun. Rev.*, XVI, 16-19 (Jan., 1927).

<sup>3</sup> The organization of state police forces is one of the most recent and interesting developments in the field of state administration. The best examples of such systems are to be found in Pennsylvania, New York, and Michigan. See P. O. Ray, "Report on State Police," *Amer. Jour. Crim. Law and Criminology*, XI, 453-467 (Nov., 1920); M. Conover, "State Police Developments, 1921-1924," *Amer. Polit. Sci. Rev.*, XVIII, 773-781 (Nov., 1924); M. M. Cor-

of country life; (10) the conservation and development of forest, mineral, water-power, and other natural resources; and (11) the construction, operation, and maintenance of public works, including state buildings, highways, canals, and parks. In countless ways, these agencies affect the daily life of the citizen.

The greatest diversity prevails among the several states with respect to the governmental agencies charged with carrying on the varied activities just enumerated; and no state appears to have followed a wholly consistent course throughout. In some instances, certain of these functions have been assigned to one or another of the principal executive officers considered in the preceding chapter. At other times, an entirely new official has been set up, for example, a highway commissioner, or a superintendent of banking, or a director of conservation. But more frequently these administrative services, the newer ones in particular, have been entrusted to boards or commissions. Where a board is employed, it usually consists of persons who serve in merely an advisory capacity, leaving to subordinates the actual administrative work. In numerous instances these boards are composed, in part at least, of *ex-officio* members—the governor, comptroller, attorney-general, etc.—who give only a small part of their time and attention to the tasks assigned to the board. Examples are to be found in boards of health, boards of education, boards of agriculture, and pardon boards. Commissions may be distinguished from boards by the fact that they are usually composed of officials who are expected to perform the actual work of administration, and give all their time to that work. When, also, an administrative agency is clothed with quasi-legislative or quasi-judicial powers, it is generally called a commission rather than a board. But this distinction does not always hold true, even in the same state, for the two terms are often used interchangeably. The most important examples of commissions, as distinguished from boards, are railway or public utility commissions, tax commissions, and civil service commissions. The extent of the power wielded by these different officers, boards, and commissions varies widely, of course, from state to state. At one extreme, they are found merely exercising the power to investigate and recommend; at the other, they may be found issuing orders and regulations which have the force of law and are enforceable in the courts, notably in

coran, "State Police in the United States; a Bibliography," *Amer. Jour. Crim. Law and Criminology*, XIV, 544-555 (Feb., 1924); B. Smith, "The State Police," *Nat. Mun. Rev.*, XIV, 594-600 (Oct., 1925); "Rural Police," *Transactions, Common. Club. of Cal.*, XXIII, 210-240 (1928).



1. Determination by the Senate whether or not required by the Constitution in several cases is a matter of interpretation and practice, required in all appointments.

2. Appointed by the Commissioner of Agriculture and the President of A & M College.

3. Appointed by Board of Agricultural Experiment Stations.

4. Appointed by Board of Agricultural Experiment Stations.

5. Three members of the board appointed by the State Legislature and the State Librarian.

6. Subsequent appointments made by board.

7. See Ex. 100.

the case of boards of health and public utility commissions.<sup>1</sup> But on the side of internal organization—that is, in determining the number of persons on their staff, the grade or rank of each, and the amount of their compensation—they have been granted comparatively slight power; such matters are usually regulated by the legislature as a part of its general control over practically the entire administrative system.

The rising tide of expenditures entailed by these multiform administrative activities has prompted searching investigations and illuminating reports by commissions on economy and efficiency in about a third of the states.<sup>2</sup> The main purpose of these inquiries has been to ascertain which, if any, of the numerous administrative agencies were unnecessary; which, if any, might profitably be combined; and in what other ways a greater degree of economy and efficiency might be introduced into the administrative branches of the state government. In almost every instance, the report of such a commission has amounted to a severe indictment of the existing state administration as unscientific, uneconomical, and inefficient. The most important specific defects brought to public attention in this way may be summarized as follows:

1. Lack of  
uniformity  
in organi-  
zation:

(a) elec-  
tive or  
appointive  
positions

There is the utmost lack of uniformity in the methods by which the members of these various administrative agencies are selected, in the length of their terms, in the ways provided for their removal from office, and in the standards of compensation. In New York, for example, just prior to the reorganization of 1927, seven of the 187 principal state administrative positions were filled by popular election, seven by the legislature, fifteen by appointment by the governor; while fourteen were *ex-officio* bodies, seventeen were

<sup>1</sup> Cf. W. H. Pillsbury, "Administrative Tribunals," *Harvard Law Rev.*, XXXVI, 405-425, 583-592 (Feb.-Mar., 1923).

<sup>2</sup> The best examples of such reports are those of the Illinois Committee on Efficiency and Economy (Springfield, 1915), the Massachusetts Commission on Economy and Efficiency (Boston, 1914), the New York Reconstruction Committee (Albany, 1919), the Michigan Community Council Commission (Detroit, 1921), and the Kentucky Efficiency Commission (1923-1924); *Report on a Survey of the Organization and Administration of the State Government of New Jersey* (1930). Other discussions along the same lines are J. L. Donaldson, "State Administration in Maryland," *Johns Hopkins Univ. Studies in Hist. and Polit. Sci.*, XXXIV (1916); Griffenhagen and associates, *A Plan for the Administrative Consolidation of Maryland* (Baltimore, 1921); *Municipal Research*, No. 61 (1915), and No. 90 (1917); F. M. Stewart, "Officers, Boards, and Commissions," *Univ. of Texas Bulletin*, No. 1854 (1918); "The Reorganization of State Administration in Texas," *ibid.*, No. 2507 (1925). See also *Amer. Polit. Sci. Rev.*, VIII, 431-436 (Aug., 1914); IX, 252, 304, 317-322 (May, 1915); X, 557-563 (Aug., 1916); and XII, 510-514 (Aug., 1918).





Defects  
in state  
adminis-  
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1. Lack of  
uniformity  
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(a) elec-  
tive or  
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positions

partly *ex-officio* and partly appointed by the governor, sixty-eight were appointed by the governor and senate, and the remainder were constituted in a bewildering variety of ways.<sup>1</sup>

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Many state boards and commissions are called non-partisan when in reality they are bipartisan, consisting of persons belonging to the two major political parties. Representation of the principal minority party upon these boards or commissions was originally intended to serve as a check upon the majority party and to mitigate the evils of partisanship in administration. In actual practice, however, this arrangement often results in bipartisan agreements concerning the distribution of patronage attached to the office, in a division of responsibility for the character of the work performed, and in warding off threatened investigations which might prove equally damaging to the two parties represented on the board. Ordinarily, much better results might be expected if all members of such boards belonged to the same party, thereby concentrating the responsibility for good or bad administration and putting the dominant party on its mettle. Such an arrangement, however, does not appeal to the ordinary politician, who appears to have an instinctive dread of being placed in a position where he must shoulder all the blame for whatever may go wrong in public administration.

(b) bi-partisan boards

The term of some of the administrative officers is definitely fixed by law and coincides with that of the governor; in the case of others, there is a fixed term which does not coincide with the governor's; while in still other instances the term is left more or less indefinite.

(c) term

There is likewise no uniformity in the methods provided for the removal of administrative officials. Impeachment by the lower branch of the legislature, followed by trial and conviction before the senate, is authorized in most states for the chief state officers; but this is a cumbersome method, seldom made use of. In New York, there are, besides the process of impeachment, no fewer than seven distinct ways of removing department heads and other principal officials; less than one-half can be removed by the governor upon his individual responsibility. In other states the situation is not essentially different.<sup>2</sup>

(d) removals

Some of the administrative officers of the state are paid a fixed

(e) compensation

<sup>1</sup> See charts accompanying the *Report of the Committee on Reconstruction* (1919).

<sup>2</sup> A. N. Holcombe, *State Government in the United States* (2nd ed., 1926), 298.

salary; others receive no salary, but are paid by the day or by fees; while still others are allowed only their actual expenses while performing their official duties.

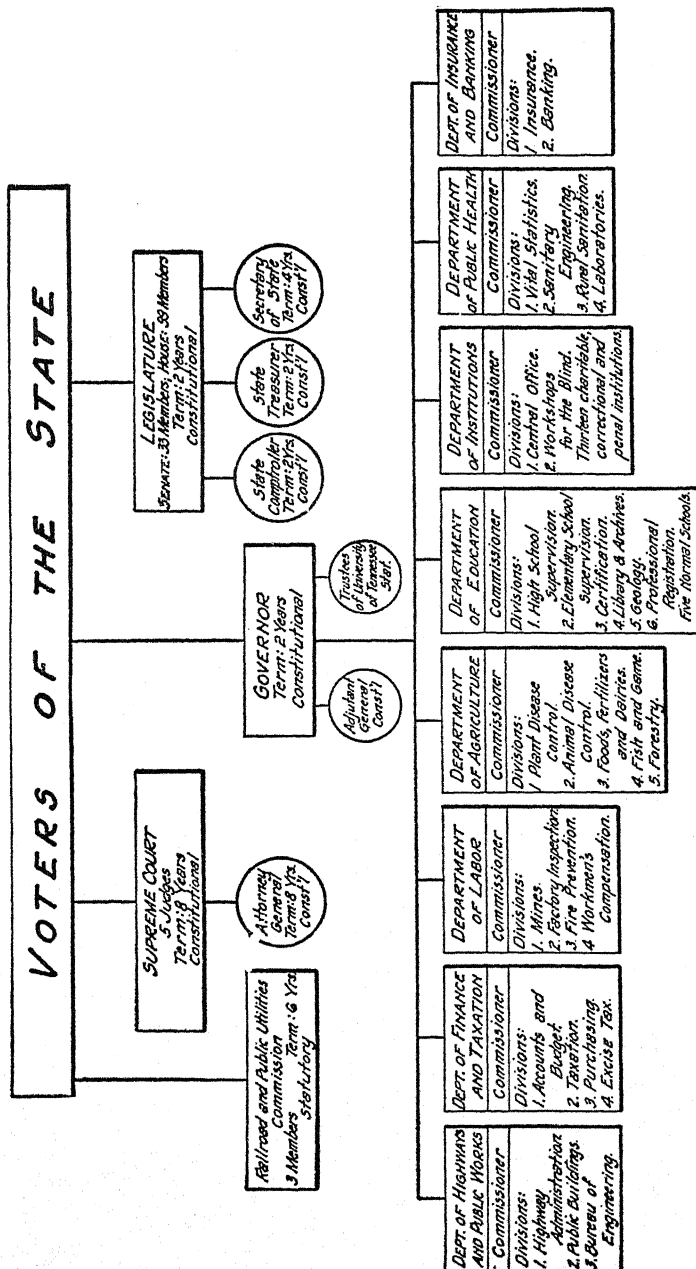
Subordinate positions attached to the various administrative departments and public institutions, aggregating more than ten thousand in several states and about twenty-two thousand in New York, are generally distributed among the political and personal friends of the officers or members of the several boards and commissions in accordance with the well-known principles of the spoils system; and this fact goes far toward explaining the inefficiency with which many state functions are performed when judged by the standards prevailing in private business enterprises.

Not only are the administrative agencies of practically all of the states seriously defective on their structural side, but numerous faults appear in the division of functions among them, and in their relations with one another. In general, there has been little effort to correlate them; and, instead of finding similar or clearly related functions combined in a single administrative office, the commissions on economy and efficiency have almost uniformly reported a most unfortunate division of related duties and activities among two or more boards, commissions, or officers, who often do their work quite independently of each other and of any central directing and controlling officer. Harmonious coöperation—in other words, teamwork—is rare and more or less accidental; offices and activities are needlessly duplicated, resulting in both inefficiency and added expense.

In Illinois, for example, before the adoption of the reforms embodied in the civil administrative code of 1917, there were separate boards for each penitentiary and reformatory, half a dozen boards dealing with agricultural interests, almost a score of more or less independent state agencies having to do with labor and mining, a series of distinct departments dealing with corporations of one kind or another, a number of boards working in the interest of public health, and numerous uncorrelated educational agencies; even a single finance department could hardly be said to exist when duties relating to state finance were divided among the governor, the treasurer, the auditor, the attorney-general, the secretary of state, the insurance commissioner, and other officers. State laws required the reporting of industrial accidents to one or more of at least five separate state offices; and "no employer was sure whether he must report to one, two, three, or more bodies; or could

# TENNESSEE

## ORGANIZATION OF STATE GOVERNMENT UNDER THE REORGANIZATION ACT OF 1923



A HIGHLY CENTRALIZED STATE ADMINISTRATIVE SYSTEM.

(Reproduced from A. E. Buck's Administrative Consolidation in State Governments, by courtesy of the National Municipal League.)

be certain as to when he had complied with the law on this subject. . . . The natural result was that in most cases the employer simply disregarded all of the laws with respect to accident reporting; and the confused relationships among the several state authorities prevented any of them from detecting his violation of the laws."<sup>1</sup> Overlapping functions, and sometimes needlessly duplicated offices, were also conspicuous in the inspectorial work carried on by some of the state departments: inspectors from the health department, from the food commission, and from the department of factory inspection might visit the same places at different times for much the same purpose and give conflicting orders, when one visit by a single set of inspectors would have been sufficient.<sup>2</sup>

3. Inadequate unifying and directing authority

Over the scores of administrative agents, boards, and commissions there is, as a rule, no unifying or coördinating authority and only very slight directing or supervisory control. A proper degree of responsibility to the governor, to the legislature, or to the people is almost everywhere lacking. Elective officers are practically independent of one another, and of the chief executive of the state as well; and the control of the governor over the appointive agencies is usually slight. With no single officer responsible for the proper functioning of the organs of state administration, it is not surprising to find the different administrative agencies looking after their legislative needs quite independently, and sometimes urging the enactment of measures which are in direct conflict. The public is accustomed to hold the governor responsible for the success or the shortcomings of the state administration; but, in reality he can exercise little or no effective control over so large a number of administrative agencies, selected in such diverse ways, serving for such varying terms, and rarely removable by his independent

<sup>1</sup> W. F. Dodd, *State Government* (2nd ed., 1928), 233-234.

<sup>2</sup> J. M. Mathews, *Principles of American State Administration*, 169-170. In New York, in 1919, there were five departments and numerous independent boards having authority over the custody of state parks, reserves, and places of interest; more than seven departments assessing and collecting taxes; more than ten departments, boards, and commissions for state correctional and charitable institutions. Legal functions were scattered through ten departments besides that of the attorney-general; and there were numerous uncorrelated educational agencies. *Committee on Reconstruction Report* (1919), 7. Before recent changes in Michigan, "responsibility and authority for dealing with state financial problems had been distributed among every elected state official and board except the lieutenant-governor. Thirty authorities divided responsibility with the governor in administering state welfare work. Problems relating to trade and commerce were divided among thirteen authorities. Education and related questions were dealt with by five elected officials and twenty-seven other authorities. . . ." L. D. Upson, "Unscrambling Michigan's Government," *Nat. Mun. Rev.*, X, 361-362 (July, 1921).

action. Under the circumstances that exist, "it is manifest that the governor does not govern, that he cannot govern, however serious his intentions to do so may be. Indeed, the whole administrative system on its legal and official side seems definitely calculated to prevent his governing." Whatever unifying and harmonizing force there is comes, in many states, from the outside, being exerted by the "invisible government" of political organizations.<sup>1</sup>

CHAP.  
XXXV  
Unity  
imparted  
only by the  
"machine"

The uneconomical character of state administration is partly traceable to the unscientific way in which it is organized, as indicated in the preceding pages. Other causes are to be found in the general absence of a modern or uniform system of accounting for the different executive departments and administrative boards and commissions; and especially in the absence, until very recently, of any arrangement for centralized purchasing of supplies and materials used by the various state officers and institutions. As in county and city administration, it has been the almost uniform practice to allow each state department or institution to purchase its own materials and supplies, subject to certain statutory regulations. For this disjointed and needlessly expensive system, centralized purchasing substitutes a purchasing bureau or agent to attend to these matters for the different administrative units. There are, of course, limits to the economies which can reasonably be expected from centralized purchasing, but there is no doubt that a great saving might be effected by its wider adoption, as the experience of the states where the system has been tried abundantly proves.<sup>2</sup>

4. Costli-  
ness of  
state  
admin-  
istration:

(a) lack  
of proper  
accounting  
and  
purchasing  
methods

The high and increasing cost of state administration is also traceable to the lack of a central agency or authority whose duty it is to study the financial needs of the various administrative de-

(b) lack  
of a  
responsible  
budget-  
making  
authority

<sup>1</sup> E. Dawson, "The Invisible Government and Administrative Efficiency," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXIV, 11-30 (March, 1916). See also in this connection Elihu Root's address to the New York constitutional convention of 1915, entitled "Invisible Government," *Rev. of Revs.*, LII, 465-467 (Oct., 1915).

<sup>2</sup> On the subject of centralized purchasing, see A. G. Thomas, *Principles of Governmental Purchasing* (New York, 1919); A. E. Buck, "The Coming of Centralized Purchasing in State Governments," *Nat. Mun. Rev.*, Supplement, IX, 117 ff. (Feb., 1920); J. M. Coyle, "Operation of Centralized Purchasing in New Jersey," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 291-297 (May, 1924); W. G. Scott, "Results of the Pennsylvania Plan for Standardizing and Purchasing Supplies," *ibid.*, 298-305 (May, 1924); M. Conover, "Centralized Purchasing Agencies in State and Local Governments," *Amer. Polit. Sci. Rev.*, XIX, 73-82 (Feb., 1925); R. Forbes, "Virginia Centralizes Purchasing," *Nat. Mun. Rev.*, XIII, 456-457 (Aug., 1924); "Wisconsin Moves Toward Executive Concentration," *Nat. Mun. Rev.*, XVIII, 725-726 (Nov., 1929); R. Forbes, *Governmental Purchasing* (1929).

partments and state institutions, to collect and revise the estimates submitted by them, and to prepare and submit for legislative consideration a comprehensive and itemized schedule of appropriations needed to ensure the maintenance of the administrative services of the state institutions without waste or extravagance. In the lack of a carefully prepared budget covering all phases of state administration, the independent and uncorrelated officers, boards, and commissions are found vigorously competing with one another before the legislature, each striving to obtain the most generous appropriations possible, without reference to the needs of the others, and without much reference to the probable revenues of the state. Furthermore, there has been, with few exceptions, no effective centralized control over the expenditure of appropriations thus obtained; whence has arisen still further waste and extravagance.

Movement  
for reform  
of state  
adminis-  
tration

Besides bringing to light these fundamental defects of state administration, the reports of economy and efficiency commissions have usually embodied certain definite suggestions and recommendations for a reorganization of the state administrative services; and these proposals have formed a starting point for the movement for administrative consolidation which has appeared in about three-fourths of the states since 1916.<sup>1</sup> By administrative consolidation is meant chiefly: (1) reorganization of the numerous administrative offices into a few coordinated departments with heads; (2) authorization of the governor to appoint these department heads, who become directly responsible to him and serve as his cabinet; and (3) careful adjustment of the terms of department heads with reference to the term of the governor. The object is, manifestly, to concentrate in the governor a real, not merely a nominal, responsibility for the state administration<sup>2</sup>—such as the president bears in relation to national administration—and to introduce a long-needed degree of unity, efficiency, and economy. Such administra-

<sup>1</sup> Excellent summaries of this movement are to be found in the *New York Committee on Reconstruction Report* (1919), 233 ff.; A. E. Buck, "Administrative Consolidation in State Government," *Nat. Mun. Rev.*, Supp., VIII, 639 ff. (Nov., 1919); *Administrative Consolidation in State Governments* (pamphlet, 5th ed., New York, 1930).

<sup>2</sup> A few states have attempted to coordinate administrative activities without increasing the power of the governor, by using a board of public affairs (Wisconsin, 1911), a state administrative board (Michigan, 1921-1927), or a group of commissions (New Jersey, 1915). See W. F. Dodd, *State Government* (2nd ed., 1928), 239-245, and H. Walker, "Theory and Practice in State Administrative Reorganization," *Nat. Mun. Rev.*, XIX, 249-254 (Apr., 1930).

tive reorganization naturally demands (1) a careful grouping of related functions under the same departmental management, based upon a careful survey of all the administrative activities of the state; (2) a proper internal organization of each department, *i.e.*, the subdivision of each department into divisions or bureaus, each with its chief responsible to the head of the department, and a logical division of departmental work among the several subdivisions; and (3) the abolition of unnecessary offices and the unification of duplicated activities. Administrative consolidation does not necessarily include reform in accounting, purchasing, and budgetary methods; but it is a prerequisite for the successful introduction of these reforms, and in the plans of administrative consolidation adopted in Illinois, Idaho, Nebraska, California, and New York these reforms have been practically concurrent.<sup>1</sup> Furthermore, the requirement of senatorial confirmation for the governor's appointments might well be relaxed, if not abandoned altogether, thus ending the friction and "trading" which often impair the governor's responsibility when he and the senate are out of harmony politically.

CHAP.  
XXXV

Essentials  
of effective  
reorganization

After some unsuccessful efforts to bring about administrative reorganization in Oregon in 1909 and 1911, in Minnesota in 1913, and in Iowa and New York in 1915, the first comprehensive plan was adopted by the Illinois legislature of 1917, following a careful preliminary survey of all the state's administrative agencies. The civil administrative code, which embodies the reform, abolished over one hundred statutory offices, boards, and commissions and consolidated their functions in nine departments, namely, finance, agriculture, labor, mines and minerals, public works, public welfare, public health, trade and commerce, and registration and education.<sup>2</sup> At the head of each of these departments is a director appointed by the governor and senate for a term of four years, coinciding with the governor's term. Under each director are an assistant director and heads of bureaus, also appointed by the governor and senate, although under the immediate control of the head of the department. Each department is authorized to appoint its own employees, subject to the civil service rules of the state. Whenever quasi-legislative or quasi-judicial duties are included in the work of a department, special boards have been provided to

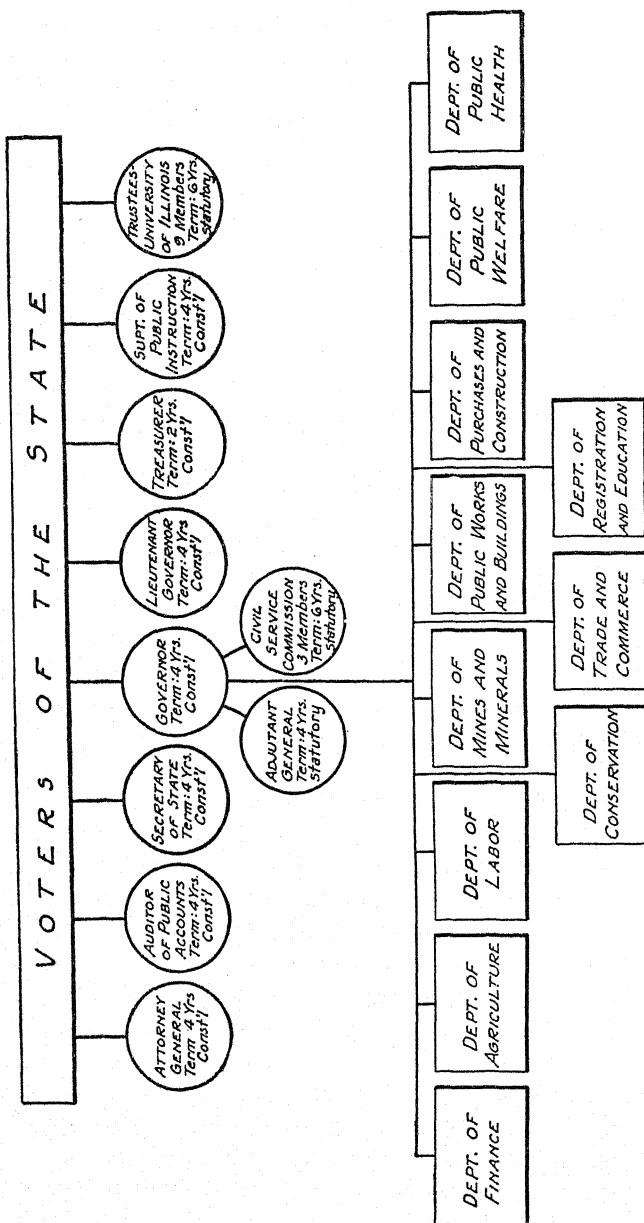
Illinois  
civil  
administrative  
code

<sup>1</sup> See p. 812 below.

<sup>2</sup> In 1925, a department of conservation and a department of purchases and construction were created.



**ILLINOIS**  
**ORGANIZATION OF STATE ADMINISTRATION UNDER THE CIVIL ADMINISTRATIVE CODE OF 1917,**  
**AS AMENDED IN 1919 AND 1925**



(Reproduced from A. E. Buck's *Administrative Consolidation in State Governments*, by courtesy of the National Municipal League.)

perform such functions.<sup>1</sup> The members of these boards are appointed by the governor and senate; and although such boards are not subject to the direction, supervision, or control of the director of any department, they are component parts of the department to which they are attached, and are under the general fiscal supervision of the director of finance. Boards of an advisory character are provided for also in the departments of agriculture, labor, public works, public welfare, public health, and registration and education. Their members, serving without pay, assist and advise the governor and directors in determining questions of policy. Provision is likewise made in this code for a centralized purchasing system for the departments, for a uniform accounting system, and for an improved executive budget system.

The work of administrative consolidation in Illinois, following the line of least resistance, was carried almost as far as the legislature could go without amendments to the constitution. Nevertheless, certain important executive officers and administrative agencies have not been affected by the new code: the duties of the seven constitutional executive officers were not changed; and more than twenty independent statutory boards, commissions, or offices remain outside of the eleven code departments, less than half of them being filled by appointment by the governor. Here, as in all other states, complete administrative consolidation, which will centralize responsibility for administration in the governor, as in the national sphere it is now centralized in the president, must await numerous constitutional amendments. The Illinois civil administrative code has, nevertheless, shown what progress can be made by ordinary legislative action toward the introduction of a scientific and efficient form of state administrative organization.<sup>2</sup>

Constitutional amendments essential to complete reorganization

The example thus set has stimulated more than a score of states

<sup>1</sup> There is an industrial commission in the department of labor, a mining board and a miners' examining board in the department of mines and minerals, a tax commission in the department of finance, a public utilities commission in the department of trade and commerce, a normal school board in the department of registration and education, and a food standards commission in the department of agriculture.

<sup>2</sup> For further details of the Illinois civil administrative code, see J. M. Mathews, "Administrative Reorganization in Illinois," *Nat. Mun. Rev.*, Supplement, IX, 739 ff. (Nov., 1920); J. A. Fairlie, "Illinois Administrative Code," *Amer. Polit. Sci. Rev.*, XI, 310-315 (May, 1917); F. O. Lowden, "Problems of Civil Administration," *No. Amer. Rev.*, CCX, 186-192 (Aug., 1919); *idem*, "Reorganization in Illinois and Its Results," *Annals Amer. Acad. Polit. and Social Sci.*, CXIII, 155-160 (May, 1924); *idem*, "Reorganizing the Administration of a State," *Nat. Mun. Rev.*, XV, 8-13 (Jan., 1926); A. E. Buck, "Illinois Civil Administrative System—What It Has Accomplished," *Nat. Mun. Rev.*, XI, 362-367 (Nov., 1922).

to give serious consideration to definite plans of reorganization and consolidation,<sup>1</sup> and at least eight additional states have begun to show signs of appreciating the importance of reconstructing their state administrative machinery.<sup>2</sup> Thus far, the most important achievements are to be noted in Idaho, Massachusetts, and Nebraska (1919), in Ohio and Washington (1921), in Maryland (1922), in Pennsylvania, Tennessee, and Vermont (1923), in Minnesota (1925), and in Virginia (1928). In California, although a beginning had been made in 1921, thoroughgoing reorganization did not come about until 1927. At that time, nearly sixty independent agencies were combined into nine departments, with heads appointed by the governor and serving as his cabinet. The legislature in 1929 completed the work of reconstruction by creating four additional departments, thus reducing the remaining independent agencies to five.<sup>3</sup>

In New York, a constitutional amendment was adopted in 1925 providing for a complete overhauling of the state's administrative "system." Shortly thereafter, a state reorganization com-

<sup>1</sup> These states, in addition to those named in the text, are Arizona, Arkansas, Colorado, Connecticut, Delaware, Indiana, Iowa, Kentucky, Michigan, Missouri, Nevada, New Jersey, North Carolina, Oklahoma, Oregon, South Dakota, Texas, and Wisconsin.

<sup>2</sup> Alabama, Georgia, Kansas, Louisiana, Maine, New Mexico, South Carolina, and Utah.

<sup>3</sup> The following articles relate to recent administrative changes, both adopted and proposed: in California, *Nat. Mun. Rev.*, X, 393 (July, 1921); *ibid.*, XVII, 220-225 (Apr., 1928); *Amer. Polit. Sci. Rev.*, XV, 576-579 (Nov., 1921); in Idaho, *Nat. Mun. Rev.*, VIII, 615-620 (Nov., 1919); in Maryland, *ibid.*, XI, 219-220 (July, 1922); *Amer. Polit. Sci. Rev.*, XVI, 640-647 (Nov., 1922); in Michigan, *ibid.*, XV, 579-581 (Nov., 1921); *Public Business*, III, 147-163 (Dec. 10, 1924); in Minnesota, *Amer. Polit. Sci. Rev.*, XX, 69-76 (Feb., 1926); in Missouri, *Amer. Polit. Sci. Rev.*, XV, 383-384 (Aug., 1921); *Washington Univ. Studies*, VIII, 151-165 (Apr., 1921); *Nat. Mun. Rev.*, XVI, 210-211, 218 (Mar.-Apr., 1927); in Nebraska, *Rev. of Revs.*, LXI, 295-302 (March, 1920); *Nat. Mun. Rev.*, XI, 192-200 (July, 1922); *Bulletin* No. 11, Nebraska Legislative Reference Bureau (1922); in New York, *Amer. Polit. Sci. Rev.*, XX, 76-79 (Feb., 1926); *ibid.*, XXI, 349-359 (May, 1927); *Nat. Mun. Rev.*, XIX, 223-225 (Apr., 1930); in Ohio, *Amer. Polit. Sci. Rev.*, XV, 380-383 (Aug., 1921); *ibid.*, XVI, 399-411 (Aug., 1922); *Nat. Mun. Rev.*, XIV, 554-564 (Sept., 1925); *ibid.*, XVIII, 249-253 (Apr., 1929); *Greater Cleveland*, III, No. 37 (June 5, 1928); in Oklahoma, *Nat. Mun. Rev.*, XIX, 308-310 (May, 1930); in Pennsylvania, *ibid.*, XVII, 597-608 (Nov., 1923); *Nat. Mun. Rev.*, XII, 526-528 (Sept., 1923); in Tennessee, *ibid.*, XII, 592-600 (Oct. 1923); in Texas, *Southwestern Polit. Sci. Quar.*, V, 230-245 (Dec., 1924); *Univ. of Texas Bulletin* No. 2507 (Feb., 1925); in Vermont, *Amer. Polit. Sci. Rev.*, XVIII, 96-101 (Feb., 1924); in Virginia, *Amer. Polit. Sci. Rev.*, XX, 832-836 (Nov., 1926); *Nat. Mun. Rev.*, XVII, 673-680 (Nov., 1928); in Washington, *Nat. Mun. Rev.*, X, 334-336 (June, 1921). The changes in these states are well summarized in A. E. Buck, *Administrative Consolidation in State Government* (pamphlet published by the National Municipal League, New York City, 5th ed., Jan., 1930).

mission was created, consisting of a group of citizens selected by the governor and the leaders in the legislature. Under the chairmanship of a former governor, Charles E. Hughes, this commission, after thorough study, reported detailed recommendations for a reorganization whereby the 180-odd administrative agencies should be consolidated into eighteen departments, the heads of which, with four exceptions,<sup>1</sup> should be appointed by the governor and senate.<sup>2</sup> The necessary legislation to carry out these recommendations was enacted in 1926, and the new scheme became effective on the first of January, 1927. As a corollary to the establishment of this new organization, the governor, solely upon his own initiative and authority, has created a cabinet comprising the heads of all but five of the new departments, which began holding regular bi-weekly meetings in February, 1927.<sup>3</sup>

CHAP.  
XXXV

"Changes in the form of governmental organization are not an end in themselves. They can be justified only in so far as they produce better results. Their primary purpose has been to systematize a control already vested in the governor but so disorganized as to be ineffective."<sup>4</sup> If, with properly constructed machinery, state administration is not more efficient and more economical than under the former system with its endless incongruities, absurdities, and lack of coördination, the fault will lie chiefly with the governor and the character of his appointees; and the public will be in a position to assign the blame intelligently, since the system will be far more understandable by the average citizen than it is to-day. Few people, and then only after long and painstaking study, can really comprehend the intricate network of departments, offices, boards, and commissions, which, until recently, has everywhere formed the administrative branch of state government. "Democracy,"

Reorgani-  
zation  
essential to  
genuinely  
democratic  
state gov-  
ernment

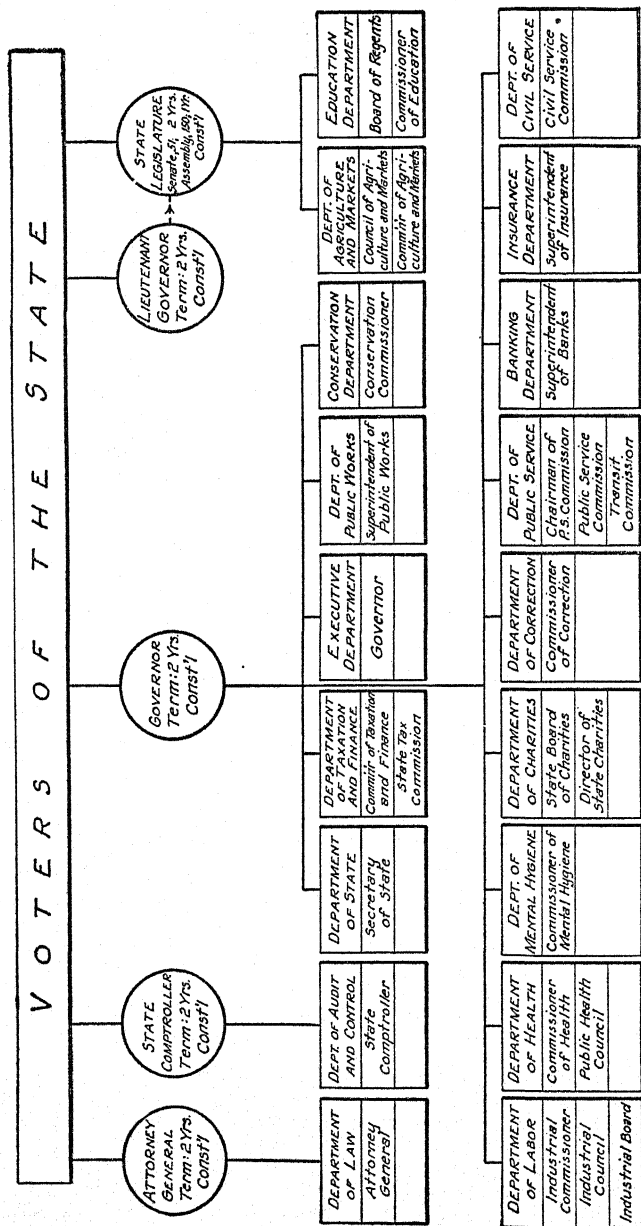
<sup>1</sup> The attorney-general, at the head of the law department, and the comptroller, at the head of the department of audit and control, are elective officials. The nominal head of the department of agriculture is the council of farms and markets, which chooses the commissioner of agriculture, the active head of the department. The board of regents of the University of the State of New York was left at the head of the department of education, with power to appoint the state commissioner of education. Several departments are headed by commissions of three or five members; but in each case a departmental chairman is provided, and the other members are restricted to their quasi-judicial functions. R. S. Childs, "New York State Reorganizes," *Nat. Mun. Rev.*, XV, 265-269 (May, 1926).

<sup>2</sup> The Hughes Commission's report is printed in full in the *N. Y. Times*, March 2, 1926.

<sup>3</sup> J. McGoldrick, "Governor Smith Introduces the Cabinet in New York State," *Nat. Mun. Rev.*, XVI, 226-229 (Apr., 1927); W. A. Warn, "Governor Smith's Cabinet Begins Its New Régime," *N. Y. Times*, Feb. 13, 1927.

<sup>4</sup> W. F. Dodd, *State Government* (2nd ed., 1928), 265.

**NEW YORK**  
**ORGANIZATION OF THE STATE ADMINISTRATION UNDER THE REORGANIZATION,**  
**EFFECTIVE JANUARY 1, 1927.**



Reproduced from A. E. Buck's *Administrative Consolidation in State Governments*, by courtesy of the National Municipal League.

as the New York Reconstruction Commission of 1919 truly said, "does not merely mean periodical elections. It means a government held accountable to the people between elections. In order that the people may hold their government to account, they must have a government that they can understand." The movement for administrative consolidation is, therefore, one more important step toward making our state governments more genuinely democratic; the reconstruction which is contemplated, when fully carried out, will mean the clearing away of a jungle whose devious bypaths have hitherto been the haunts of the spoilsman and the grafter.

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XXXV

To produce the most satisfactory results, however, the structural changes described above must be accompanied by a thorough regeneration of the method of filling the thousands of subordinate positions connected with state institutions and administrative services. Personal favoritism and partisan considerations, which are almost everywhere the controlling factors, need to be eliminated and the merit system substituted. The merit system is founded on the principle that public office is a public trust, which should be bestowed only upon persons of proved fitness. It assumes that the public is entitled to reasonable qualifications on the part of its servants, and that these can, in a vast majority of cases, be ascertained by a properly devised and fairly administered system of competitive examinations, open to all applicants. It also aims to prevent promotion or dismissal, for merely personal or political reasons, of public employees selected in this manner; and to establish the rule that removals shall be made only for legitimate causes, such as dishonesty, negligence, and inefficiency. The system ought, therefore, to be made to apply, not only to the appointment, but also to the promotion and removal, of practically all non-policy-determining subordinate positions connected with the state administration. The adoption of the merit system, furthermore, tends to bring about the appointment of better qualified persons for positions in the service of the state, and to secure for them and for the state the advantages that should accompany permanence of tenure; and it helps protect the governor and other appointing officers from the importunities of office-seekers, who sometimes invade official residences much as frogs covered the land of Egypt.

Civil  
service  
reform

Essential  
features  
of the  
merit  
system

The most effective device for uprooting the deeply entrenched spoils system is the enactment and honest enforcement of a carefully drawn civil service law. Unfortunately, less than a dozen states have such laws. Following the example of the national gov-

State civil  
service  
laws

ernment, New York and Massachusetts adopted civil service laws in 1883 and 1884, respectively. But for more than twenty years they stood alone; everywhere else the spoils system held full sway until 1905, when Wisconsin and Illinois, and 1907, when Colorado and New Jersey, put merit laws into operation. These states were followed in 1913 by California, Connecticut,<sup>1</sup> and Ohio, in 1915 by Kansas,<sup>2</sup> and in 1920 by Maryland. In three states (New York, Colorado,<sup>3</sup> and Ohio), the state constitution requires the enactment of civil service laws embodying the merit principle, but elsewhere the merit plan rests entirely upon the insecure foundation of statutes which may be repealed at any time or so amended as to restrict its application to comparatively few employees.<sup>4</sup>

In their main features, state civil service laws are modeled upon the national civil service act of 1883,<sup>5</sup> and include provisions for the classification of state employees, competitive examinations for their appointment and promotion, and clauses prohibiting appointments and removals for political reasons. These laws are usually administered by bi-partisan civil service commissions consisting of three members,<sup>6</sup> appointed by the governor and senate.

<sup>1</sup> The Connecticut law was repealed in 1921.

<sup>2</sup> Although Kansas has a civil service law, it has had no commission to administer it since 1922, owing to the failure of the legislature to make the necessary appropriations.

<sup>3</sup> Colorado has had two constitutional amendments on civil service; the last, in 1918, is much more stringent than the earlier one. See S. H. Ordway, "The Civil Service Clause in the Constitution," *Acad. Polit. Sci. Proceedings*, V, 251-262 (1914).

<sup>4</sup> A convenient summary of most of the state civil service laws will be found in *Ill. Committee on Efficiency and Economy Report* (1915), 911 ff. See also J. M. Mathews, *Principles of American State Administration*, Chap. ix; A. S. Faught, "A Review of the Civil Service Laws of the United States," *Nat. Mun. Rev.*, III, 316-326 (April, 1914), and VIII, 275-278 (June, 1919). See also H. W. Dodds, "Governor Pinchot and the Merit System," *Nat. Mun. Rev.*, XIV, 220-226 (Apr., 1925); *Transactions of the Commonwealth Club of California*, XVI, 299-346 (Dec., 1921), "Civil Service in California;" M. Conover, "Merit Systems of Civil Service in the States," *Amer. Polit. Sci. Rev.*, XIX, 544-560 (Aug., 1925); "The Organization and Work of the New Jersey Civil Service Commission," *Public Personnel Studies*, V, 111-124 (June, 1927); "Supplemental Report of the New Jersey State Civil Service Commission," *ibid.*, VIII, 2-28 (Jan.-Feb., 1930). For an extended list of references on civil service reform, see P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed.), 595-605.

<sup>5</sup> See pp. 386-390 above.

<sup>6</sup> Maryland puts the administration of the law in the hands of a single commissioner. See F. Telford, "The One-Man Civil Service Commission in Maryland," *Nat. Mun. Rev.*, XII, 358-362 (July, 1923); O. C. Short, "The Maryland One-Man Civil Service Commission," *ibid.*, XV, 153-157 (Mar., 1926). California also had a one-man commission from 1925 to 1927, but in the latter year the legislature reestablished a commission of three members, similar to the Massachusetts commission.

However wisely and skillfully a civil service law may be drawn, the success or failure of the merit system depends very largely upon the character, ideals, and efficiency of the members of this commission. The best of such laws can be made a farce in practical operation in the hands of an indifferent or hostile commission. And this has frequently happened when the commissioners have been purely political appointees, closely identified with the spoils system which they were supposed to eliminate or check, and have merely reflected the governor's own attitude toward the merit system. Civil service administration under commissions thus constituted has in reality been the work of a crew deliberately setting out to wreck the system without violating the letter of the law. For although civil service commissioners may bar the main entrance to the government, they may allow political favoritism and partisanship in roundabout ways; for example, through their power to grant exemptions from examinations in special cases, through abuse of the right to make temporary appointments without examination in order to meet "emergencies," or by using their power to transfer employees from one branch of the service to another so as to bring about the appointment to competitive positions of personal or political friends without subjecting them to the inconvenience of passing the required examinations. If, however, the governors of the states can be made to feel that public opinion will emphatically condemn this playing fast and loose with civil service regulations, we shall soon find the laws administered in a manner that commands general respect.

Until very recently, civil service commissions—national, state, and municipal—have practically everywhere confined their activities to the preparation and conduct of competitive examinations. They, and the general public, have assumed that the main, if not the sole, function of such commissions is to keep spoilsmen out of the public service. That function is of the first importance, and will always remain so; there should be no let-up in that work. Nevertheless, it is becoming more and more apparent that the commissions should not stop with this negative function. In numerous direct and positive ways—by assuming new, or comparatively undeveloped, functions as the personnel or employment division of the state corporation—civil service commissions, if composed of men of vision, energy, and practical experience as employers, can enhance the general efficiency of state administration. By devising and putting into operation methods of measuring and increasing

CHAP.  
XXXV

Civil serv-  
ice com-  
missions

New  
functions



the efficiency of state employees, by stimulating in them ambition for promotion, by enlarging their opportunities for self-improvement, and by establishing uniform standards of compensation, civil service commissions have it in their power to make far greater contributions to the general efficiency of state government than most of them have made in the past.<sup>1</sup>

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<sup>1</sup> The merit system has made greater headway in the field of municipal government than in that of state government. The work of civil service commissions in the two fields, however, is not fundamentally different. Hence the recent discussions of ways and means of improving municipal civil service administration should prove of much value in the administration of the state civil service law. See Governmental Research Conference Report, *The Character and Functioning of Municipal Civil Service Commissions in the United States* (Cleveland, 1922); National Municipal League, "Report of the Special Committee on Civil Service," *Nat. Mun. Rev.*, XII, 441-471 (Aug., 1923); also *40th Annual Report, U. S. Civil Service Commission* (Washington, 1923), pp. i-c; *Public Personnel Studies*, II, 13-59 (Mar.-Apr., 1924), "Methods of Selecting Employees to Fill High Grade Positions in the Public Service;" C. P. Messick, "The Personnel Agency as an Integral Part of Public Administration," *ibid.*, V, 1-10 (Jan., 1927); E. L. Trinkle, *Report on the State Personnel Situation in Virginia to the General Assembly, January, 1926* (Richmond, 1926). Personnel legislation in 1929 and 1930 is summarized in *Amer. Polit. Sci. Rev.*, XXIII, 112-115 (Feb., 1929), and XXIV, 104-109 (Feb., 1930).

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## CHAPTER XXXVI

### STATE FINANCE

How to obtain the money requisite to carry on the numerous and varied activities mentioned in the preceding chapter, how to apportion the state's revenues among the different administrative enterprises and agencies, how to set and maintain the necessary safeguards against waste and corruption, how to limit the state's borrowing power, if at all, and how to link up state finances, in the narrower sense, with the finances of counties, towns, and other local government areas—these are problems second in importance and difficulty to none which we have thus far encountered in the field of state government. Certain of them, notably those pertaining directly to the raising and spending of money, call for some study at this point.<sup>1</sup>

Sources  
of state  
revenue

With respect to sources of revenue, it is not surprising to find marked differences among the forty-eight states; nor to discover that, in view of the steadily increasing cost of state government, almost every state has been obliged not only to increase the amounts derived from old sources of income, but to cast about for new ones.<sup>2</sup> In general, the revenues of the state now fall into the following nine categories.

(1) Earnings of public service enterprises established and maintained by the state, such as docks, wharves, warehouses, ferries, toll-bridges, canals, mills and elevators, coal mines, publishing houses, and irrigation projects.<sup>3</sup>

<sup>1</sup> The constitutional limitations on taxation and indebtedness have been summarized in Chap. XXXII. On these phases of state finance, see H. Seerist, "An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States," *Univ. of Wis. Bull.*, VIII, No. 1 (1914).

<sup>2</sup> An interesting and valuable study of the increase in the cost of state government in New York is to be found in the report of the Special Joint Committee on Taxation and Retrenchment on *State Expenditures, Tax Burden, and Wealth* (1926). See also C. M. Puckett, "Costs of Government Rise to Record Height," *N. Y. Times*, June 5, 1927; C. Heer, "Rising Cost of State Government; Popular Theories versus Fiscal Facts," *Nat. Mun. Rev.*, XV, 277-282 (May, 1926); "State Expenditures—Has Their Upward Climb Been Justified?," *ibid.*, XVI, 322-328 (May, 1927).

<sup>3</sup> The total from this source in 1928 was only \$14,240,809. Of this sum, 67.8 per cent came from the three states of New Jersey, North Dakota, and

(2) Fees, or highway-privilege dues, exacted from individuals or corporations enjoying a special privilege of using the streets and roads of the state in providing public services, such as those furnished by electric railway, lighting, telephone, and water companies.<sup>1</sup>

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(3) Receipts from the rental of real estate held principally or wholly for investment purposes, such as the income from school lands, especially in the western states.<sup>2</sup>

(4) Interest received on sinking funds, public trust funds, and on current deposits of state money in banks.<sup>3</sup>

(5) Fees, charges, and earnings accruing to the general departments of the government, *i.e.*, the various administrative agencies, state institutions, and the courts. Included here are fees for inspections, charges for filing, copying, or recording legal documents, tuition and other fees charged in state educational institutions and for the care of inmates of charitable institutions, and sometimes also the earnings of industries carried on in penal or charitable institutions.<sup>4</sup>

(6) Receipts from court fines imposed in criminal cases, from forfeiture of bonds, and from escheats, *i.e.*, property the owners of which cannot be ascertained or located.<sup>5</sup>

(7) Subventions or grants by the federal government, mainly for educational purposes and highway construction;<sup>6</sup> also donations or gifts from private persons or corporations, the principal or income of which can be expended for designated state uses; and contributions by state employees toward pension or retirement funds.<sup>7</sup>

(8) Special assessments and charges to defray the cost of specific public improvements or public services undertaken pri-

California. These figures and those in the notes which follow are taken from the Bureau of the Census, *Financial Statistics of States* (1928).

<sup>1</sup> Only five states reported receipts from this source in 1928. The receipts, aggregating \$210,810, came principally from electric railways for paving between tracks and for the use of state bridges.

<sup>2</sup> In 1928, \$15,255,882 was derived from this source, the largest amount (\$3,506,404) being reported by Texas.

<sup>3</sup> \$63,072,810 was derived from this source in 1928.

<sup>4</sup> General departmental earnings in 1928 amounted to \$143,919,403.

<sup>5</sup> From this source \$3,584,098 was received in 1928.

<sup>6</sup> See pp. 625-627 above.

<sup>7</sup> The total amount derived from these sources in 1928 was \$141,928,568. Of this amount, \$115,587,917 was received from the federal government as subsidies or grants, \$82,201,653 being for highways and \$11,584,592 for education, including contributions toward the support of state universities and agricultural and mechanical colleges. Contributions to pension or retirement funds amounted to \$16,614,878.

marily in the interest of the public, such as for the cost of highway construction and repair, for forest-fire patrol, for maintenance of drainage districts, and for other improvements and services assessed against the benefitted properties or persons.<sup>1</sup>

(9) Large, however, as are the sums obtained in some states from these varied sources, by far the greatest amount of revenue is derived from taxation.<sup>2</sup> The most productive kinds of taxation, one or more being found in every state, are the following: (a) corporation taxes,<sup>3</sup> which may assume a variety of forms, such as a tax upon capital stock, corporate indebtedness, deposits held by banks, value of insurance policies, or "corporate excess;"<sup>4</sup> (b) inheritance and estate taxes, which are now found in all the states except Alabama, Florida, Nebraska, and Nevada, and usually take the form of graduated or progressive taxes applied to both direct and collateral inheritances, although in some states only the latter are taxed;<sup>5</sup> (c) personal and corporation income taxes;<sup>6</sup> poll taxes,

<sup>1</sup> The total from this source in 1928 was \$34,341,215.

<sup>2</sup> In general, it may be said that a state has the right to tax all persons, including corporations, residing or doing business within its bounds, and all forms of property located within the state, except in so far as this right may be restricted by provisions in the state constitution. To this generalization, however, there are important exceptions. For example, states may not tax imports from foreign countries, interstate commerce, or the agencies, instrumentalities, or property of the national government, at least in such a manner as to impair their efficiency. See pp. 125-127 above. Cf. J. T. Young, *The New American Government and its Work* (rev. ed.), Chap. XXI.

<sup>3</sup> The sum of \$105,635,553 was derived from corporation taxes in 1928. Educational, charitable, and religious corporations are almost always exempted, in whole or in part, from the taxes which are imposed upon corporations organized for profit. See *Report of the [New York] Special Joint Committee on Taxation and Retrenchment, "Tax Exemption in New York"* (1927).

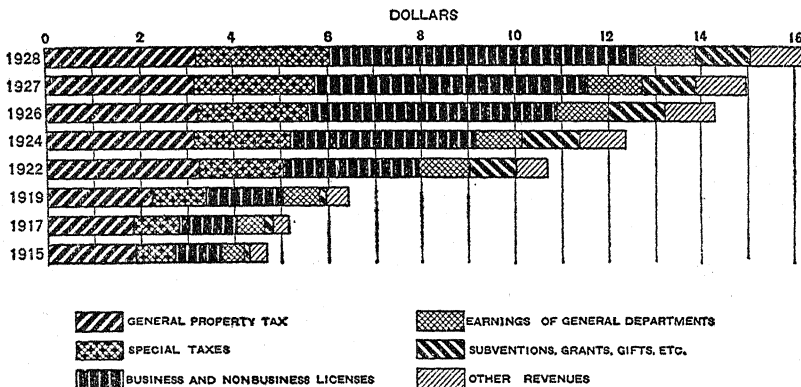
<sup>4</sup> "The corporate excess is the remainder found by deducting the assessed value of the tangible property from the equalized market or actual value of the capital stock, plus bonded indebtedness." J. M. Mathews, *Principles of American State Administration*, 250.

<sup>5</sup> The amount derived from inheritance and estate taxes in 1928 was \$127,538,301. See [national] Committee on Inheritance Taxation, *Report to the National Conference on Estate and Inheritance Taxation* (1925); R. A. Vandegrift, *Inheritance Tax Analysis* (Los Angeles, 1927); M. West, "The Inheritance Tax," *Columbia Univ. Studies in Hist., Econ., and Public Law*, IV, No. 2 (2nd ed., 1908).

<sup>6</sup> In 1929, more than \$166,000,000 was derived from this source by the fifteen states using it, namely, Connecticut, Delaware, Massachusetts, Mississippi, Missouri, Montana, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Virginia, and Wisconsin. At the date mentioned, an income tax law in Oregon was suspended pending a referendum to be held in 1930. Four additional states (besides Oregon) now (1931) have income tax laws, i.e., Arkansas, California, Georgia, and Washington, making a total of twenty. See A. Comstock, "State Taxation of Personal Incomes," *Columbia Univ. Studies in Hist., Econ., and Public Law*, XCVI (1921); and especially R. G. Blakey, *State Income Taxation* (Univ. of Minnesota Library, 1930).

including all per capita taxes, uniform or graded;<sup>1</sup> (e) specific taxes upon property without regard to value, for example, on land per acre or on cattle per head; (f) business taxes, exacted from persons or corporations in proportion to the volume of their business or by reason of the business in which they are engaged, *e.g.*, motor fuel or gasoline taxes and taxes on insurance and other incorporated companies;<sup>2</sup> (g) non-business license taxes, exacted primarily for the purpose of regulation, including taxes on motor vehicles, hunting and fishing, and dogs;<sup>3</sup> and (h) the general

PER CAPITA REVENUE RECEIPTS, BY PRINCIPAL CLASSES,  
OF THE 48 STATES FOR SPECIFIED YEARS: 1915-1928



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property tax. Because of its widespread use, the prevalent dissatisfaction with it in many states, and its intimate relation to the chief problems of tax reform, the general property tax calls for somewhat more detailed consideration.

Until recently, the general property tax was the chief single source of state revenue, the amount derived from it as late as 1915 being about forty per cent of the total state income. Since that date (as the accompanying diagram will show), there has been

General  
property  
tax

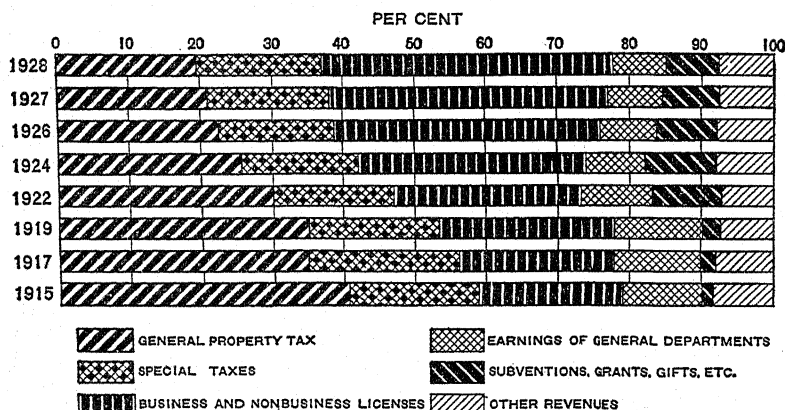
<sup>1</sup> The nine states using this tax in 1928—California, Georgia, Indiana, Maine, New Hampshire, Texas, Vermont, Virginia, West Virginia—reported only \$3,853,712.

<sup>2</sup> From business taxes the states derived \$505,476,981 in 1928, of which \$241,917,729 came from motor fuel, or gasoline, taxes. These last are now levied in all states. F. G. Crawford, *The Administration of the Gasoline Tax in the United States* (New York, 1928).

<sup>3</sup> Non-business license taxes produced, in 1928, \$277,792,988, of which, \$264,878,392 came from motor vehicle licenses. See H. A. Barth, "State Taxation of Passenger Automobiles," *Nat. Mun. Rev.*, XIII, 641-651 (Nov., 1924).

a marked falling off in the proportion of revenue derived from it—a decline from 40.6 to 19.7 per cent;<sup>1</sup> and a corresponding increase in the amount derived from business and non-business license taxes—from 20.3 to 40.5 per cent. A number of states, notably California and Pennsylvania, make little or no use of the general property tax for state purposes.<sup>2</sup> In those states, however, as in all others, it is the main reliance for the support of county and other local government units.<sup>3</sup>

PER CENT DISTRIBUTION OF RECEIPTS OF THE 48 STATES  
FROM THE SEVERAL SOURCES OF REVENUE FOR  
SPECIFIED YEARS: 1915-1928



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Theory  
of the  
tax

This tax is an *ad valorem* levy upon real estate and upon both tangible and intangible personal property. Its original purpose was to spread the public burden as equitably as possible over all persons in accordance with their respective abilities to contribute,

<sup>1</sup> In 1928, the total amount raised by the general property tax for state purposes was \$381,170,949.

<sup>2</sup> This statement also holds true for Connecticut, Delaware, New York, and North Carolina.

<sup>3</sup> In 1922, the total amount of general property taxes for state and local purposes was \$3,503,725,000—an increase of 159.6 per cent over the amount raised in 1912. In all the states except Massachusetts, Georgia, and Arkansas, the total general property tax in 1922 was more than 100 per cent greater than in 1912; and in ten states the increase was over 200 per cent. U. S. Bureau of the Census, *Wealth, Public Debt, and Taxation: 1922*, "Assessed Valuation and Tax Levies," 7.

Brief discussions of the general subjects of state revenue and taxation will be found in J. M. Mathews, *Principles of American State Administration*, Chaps. x-xi; J. T. Young, *The New American Government and its Work* (rev. ed.), Chap. xxi; *Ill. Const. Conv. Bull. No. 4* (1920), "State and Local Finance;" W. F. Dodd, *State Government* (2nd ed.), Chap. xvii.





measured by the value of the property they owned. Its history goes back to a period in which people were profoundly influenced by a political philosophy which insisted upon the strict equality of all men before the law. It was assumed that the natural equality of men extended not only to their persons but to their property, so that it was regarded as an act of discrimination and fundamental injustice to tax one form of property at a different rate from another.

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In early times, the application of this theory worked no real injustice. Houses and lands could not, of course, be concealed; and practically all personal property was tangible, consisting mainly of horses, cattle, wagons, farm implements, tools, grain, merchandise, and household furniture. All these could easily be located and their value determined by the tax assessor; so that comparatively little, if any, taxable property escaped paying its just share. In the past seventy years, however, there has been an enormous increase in the amount and variety of intangible personal property, especially in the form of stocks, bonds, and mortgages; so that, taking the country as a whole, the value of intangibles is now greatly in excess of the value of real property subject to taxation. These newer forms of personal property are easily concealed, and the owner has every temptation to conceal them when the rate of taxation, determined primarily with reference to real estate and tangible personal property, is such as to compel him to yield up in taxes from one-fourth to one-half, or even more, of the net income derived from these securities—a result which really amounts to confiscation.

Objection-  
able  
features

Under present conditions, the uniform general property tax in many states is neither uniform nor universal nor equitable. Real property usually bears more than its fair share of taxation, but there is often the greatest lack of uniformity in the valuations placed upon the same class of real estate located in different parts of the same state, and even within the same county. Personal property, on the other hand, either is notoriously undervalued or escapes taxation altogether. Some interesting instances of undervaluation are revealed in the Illinois state tax reports. Illinois ranks high as an agricultural state; but the assessed value of her live-stock in 1928 would never lead one to suspect it, for horses were averaged at \$38.28, cattle at \$30.73, hogs at \$6.28, and sheep at \$5.03.<sup>1</sup> Undervaluation probably also accounts for the fact that

<sup>1</sup> Illinois Tax Commission, *Tenth Annual Report* (1928), 237-246.

the average assessed value of carriages and wagons was only \$18.27; of automobiles, \$113.52; of watches and clocks, \$8.23; of sewing and knitting machines, \$9.09; and of pianos, \$43.04. Undervaluation, however, is obviously better than no valuation; and that much personal property escapes taxation altogether may be inferred from a few other Illinois instances. In Chicago, the second largest and wealthiest city in the western hemisphere, the full cash value of all diamonds and jewelry owned was, according to the tax reports for 1911, the ridiculously low sum of about half a million dollars. From the same tax returns one might infer that watches and clocks were luxuries enjoyed only by the favored few, for apparently only one person in 188 owned any. If luxuries in 1911, they must have become curios by 1927 when only one person in 500 possessed a time-piece! But Chicagoans were apparently better off in that respect than the people of Henry and Putnam counties, where modern time-pieces seem practically to have vanished, since only three persons in one county and ten in the other admitted to the tax officials that they owned a watch or clock! Almost ten million hogs, five million sheep, and four million cattle were received and sold in the Chicago markets during the year 1913; yet the tax records show that in the whole of Cook county there were assessed for taxation only 26,500 cattle, 683 sheep, and 8,085 hogs. These records also show that the grain elevators and warehouses of Chicago held in storage on the first day of April, 1918, grain having an assessed value of only \$779,644, whereas the actual market value of the millions of bushels held in storage on that date was \$17,778,700.<sup>1</sup>

Self-  
assessment  
by owners  
of personal  
property

In many communities, the assessment of personal property taxes is almost wholly restricted to those persons whose names are on the assessment rolls as the owners of taxable real estate. It is, of course, physically impossible for the tax authorities to assess all tangible personal property from actual view; hence it has become customary in many places to require the tax-payers themselves to make out sworn statements of their taxable property, a method which practically amounts to self-assessment. Under such circumstances, instead of being equal in proportion to ability to pay, the

<sup>1</sup> Report of the Sub-Committee of the Revenue Committee of the Illinois House of Representatives (1918). See also R. M. Haig, "History of the General Property Tax in Illinois," *Univ. of Ill. Studies*, III, Nos. 1-2 (1914); J. A. Fairlie, *Report on the Taxation and Revenue System of Illinois* (1910); *Ill. Const. Conv. Bull.*, "Constitutional Conventions in Illinois" (1920), 76-89; *ibid.*, No. 4, "State and Local Finance" (1920).

tax becomes progressive in proportion to the honesty of the taxpayer in making out his tax-list. "It thus places a premium on dishonesty and has been justly described as a 'school of perjury.' " The upshot is that personal property everywhere fails to bear its proportionate share of the burden of taxation. The figures of the United States census bureau show that in 1922 the assessed value of real property and improvements subject to the general property tax was, for the entire country, over ninety-two billion dollars, while that of personal property was less than twenty-seven billions, though the true value of personal property was doubtless considerably greater than that of real estate.<sup>1</sup>

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The foregoing statements indicate in a very broad way some of the principal reasons why, in most states, the general property tax has come to be regarded as thoroughly unsatisfactory, and partial substitutes have been adopted. In over thirty states, defects of the general property tax which are traceable to the uniformity requirement have been greatly reduced, and to a considerable extent eliminated, by express or implied constitutional grants of authority to the legislature to classify different kinds of property and to impose a different rate of taxation upon the various classes, provided the tax is uniform for all property falling within any given class.<sup>2</sup>

Substitutes  
for the  
general  
property  
tax

Examples are to be found in the New York mortgage and bank stock taxes and the Minnesota "money and credit tax." This classification system makes it possible, among other things, to impose a lower and more equitable rate upon intangibles than upon real estate, with the result that, by removing the motive for concealing such property from the assessors, vastly larger amounts are reported annually for taxation, with a consequent heavy increase in the revenue of the state from this source. This plan of taxing securities at a lower rate has also been adopted in Pennsylvania, Maryland, Minnesota, California, and other states, with generally far more satisfactory results than were obtained under the old uniform tax.<sup>3</sup>

Other widely adopted substitutes are inheritance and income

<sup>1</sup> See *Report of the [New York] Special Joint Committee on Taxation and Retrenchment* (1922), 42-61.

<sup>2</sup> S. E. Leland, *The Classified Property Tax in the United States* (Boston, 1928).

<sup>3</sup> *Ill. Const. Conv. Bull.*, "Constitutional Conventions in Illinois" (1920), 76 ff. See also Fifth Annual Conference on State and Local Taxation, *Addresses and Proceedings*, V, 333-343, "Report of Committee on Practicable Substitutes for the General Property Tax."

taxes. So one may say that the trend of tax reform to-day is directly away from the once universal general property tax and toward the adoption of one or more of the substitutes named above.<sup>1</sup> On the whole, however, the movement for tax reform has progressed rather slowly, partly because of the fact that many people are able or willing to see only the theory upon which the general property tax is founded, rather than its actual operations; partly because of restrictions which prevent modification of the system without constitutional amendment;<sup>2</sup> and, lastly, because of the feeling of certain persons or classes of persons that any change in the system of taxation would affect their private interests adversely.<sup>3</sup>

Not all of the defects connected with the general property tax, however, are inherent in the nature of the tax; some arise out of the methods by which the tax is assessed, and where these methods have been improved, in one or more of the ways indicated below, popular dissatisfaction with the system has to some extent abated.

The methods of levying and collecting the tax are, in their more fundamental features, the same in all of the states. The property is valued by a local assessor of the town, township, or county, as the case may be, and the same assessment lists are commonly used as the basis of state, county, and municipal taxation. Assessments

<sup>1</sup> In some states, certain sources of revenue have been set aside for taxation for state purposes and other sources have been reserved for local taxation. "The principal sources reserved for state taxation are banks, insurance companies, public service corporations, inheritances, and incomes." M. Newcomer, "Separation of State and Local Revenues in the United States," *Columbia Univ. Studies in Hist., Econ., and Public Law*, LXXVI (1917). There has also been much discussion in recent years among students of public finance of the desirability of a similar differentiation of the objects of state and national taxation. In 1917, representatives of forty-two states met at Atlanta to propose measures for recommendation to Congress along this line. On this general subject, see E. R. A. Seligman, *Essays in Taxation* (8th ed., New York, 1913), Chap. XII; *Annals Amer. Acad. Polit. and Soc. Sci.*, LVIII, 1-11, 59-64, 105-111 (March, 1915); *Nat. Tax Assoc. Proceedings* (1919), 128-145; J. E. Boyle, "A Program for Redistributing Sources of Revenue as between Cities, States, and National Government," *Annals Amer. Acad. Polit. and Soc. Sci.*, XCV, 272-276 (May, 1921).

<sup>2</sup> Constitutional amendments relating to taxation have been proposed in large and increasing numbers since 1900. Between 1900 and 1918, 257 amendments on taxation were submitted to popular vote, of which 141 were adopted and 116 failed. One or more amendments were submitted in all but six states, i.e., Vermont, Connecticut, Rhode Island, Delaware, New Jersey, and Indiana. *Ill. Const. Conv. Bull.*, No. 4 (1920), "State and Local Finance," 249. Between 1920 and 1930, inclusive, over fifty taxation amendments were adopted. See W. E. Hannan, "State Tax Legislation in 1921," *Amer. Polit. Sci. Rev.*, XVI, 53-73 (Feb., 1922), and references on recent constitutional amendments, p. 681, n. 2, above.

<sup>3</sup> H. D. Simpson, "The Strategy of Tax Reform," *Nat. Mun. Rev.*, XIX, 766-770 (Nov., 1930).

of personal property are often made annually; those of real estate, usually once in three or four years. All property is supposed to be assessed either at its full market value or at some specified percentage thereof. In Illinois, for example, the basis of assessment was for a long time one-third of the real value, but has recently been increased to one-half. Although the work of assessing property for purposes of taxation is of the greatest importance, and ought to be done in accordance with scientific principles and methods, it is, as a rule, rather poorly performed. A main reason is that the assessors are commonly elective officials with no training which qualifies them to weigh the many factors entering into the determination of property values. "Much of what they do is mere guesswork."<sup>1</sup> Some improvement in the work of local assessment has been effected in a number of states, especially in a few of the larger cities, by lengthening the terms of assessors, giving them more adequate compensation, providing for appointment instead of popular election, and supplying them with modern tax maps, valuation tables, and other necessary tools; and much more might be accomplished in this direction.<sup>2</sup> Of course, the adoption of a "scientific" system of assessment does not dispense with the need for judgment nor eliminate the influence of other human factors. But, by furnishing the assessors with all the relevant facts, it does away with all unnecessary guessing; it encourages equality of treatment; and it brings the work of assessment out into the open where the public can know and understand what is going on.<sup>3</sup>

In property assessments made by untrained and locally chosen

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Inefficient  
assessors

Improved  
methods  
of local  
assessment

<sup>1</sup> For interesting comments on the qualifications of tax assessors elected in New York, and upon their methods of assessing property, see *Report of the Special Joint Committee on Taxation and Retrenchment* (1920), 117-134; *ibid.* (1921), 48-62; *ibid.* (1923), 103-127.

<sup>2</sup> See L. Purdy, "The Assessment of Real Estate," *Nat. Mun. Rev.*, Supplement, VIII, 512-527 (Sept., 1919); W. A. Somers, "The Valuation of Real Estate for Taxation," *ibid.*, II, 230-238 (April, 1913); H. L. Lutz, "The Somers System of Realty Valuation," *Quar. Jour. Econ.*, XXV, 172-181 (Nov., 1910); W. B. Munro, *Principles and Methods of Municipal Administration* (New York, 1916), Chap. x.

<sup>3</sup> That scientific assessment also pays in dollars and cents appears from the following comment by a former mayor of Buffalo on the adoption of such a system in that city, at a cost of \$60,000: "As a result of this work, in four years' time, \$177,000,000 has been added to the total assessed value of real estate. This has increased the borrowing capacity of the city. It has inflicted hardship on no one because the assessments are now based on actual and careful measurements and surveys, and thus are impartial. It has made it possible for the city to have the best of credit during the period of the War. . . . Many cities suffered financial distress, but Buffalo has been in an easy and comfortable position. . . ." G. S. Buck, in *Nat. Mun. Rev.*, IX, 94-95 (Feb., 1920).

officials working independently in their several localities, great inequalities inevitably appear in the valuations placed upon the same sort of property in different parts of a state, and even in different parts of the same county. In the case of real estate, these have been known, in one section or another, to vary from ten to over a hundred per cent of the actual value. To correct, in some measure, these inequalities, there is in a few states, immediately above the local assessor, a city or township board of review with power to increase or decrease individual assessments. Above this local board, or above the local assessors, there is usually a county board of review, or some officer, like the county treasurer, whose duty it is to equalize the aggregate assessment of the townships or other taxing districts within the county, and who may also usually change individual assessments. These county and other boards of review are commonly *ex-officio* bodies, "who are either constituted judges of their own work of assessment or else are too unfamiliar with conditions with which they are called upon to deal. Hence the work of such boards is largely ineffective; political influences not infrequently enter into their determinations, and sometimes their conduct of official business has degenerated into a contest between groups of members representing urban and rural taxing districts, respectively, in which entire valuations of districts are arbitrarily increased or diminished."<sup>1</sup> Finally, in all but a few southern states there is a state board of equalization, performing functions for the entire state similar to those performed for the counties by the county boards of review. In a number of states, this duty has been conferred upon permanent state tax commissions, which also have other important functions; while in still other states certain elective state officers, acting *ex-officio*, serve as the state board of equalization. The work performed by the last kind of state board has, on the whole, tended to become more or less perfunctory.

State  
central  
supervision

Although reform in the administration of the general property tax is primarily of importance to the local communities, the state itself has a very direct interest therein from the standpoint both

<sup>1</sup> J. M. Mathews, *Principles of American State Administration*, 234. On the gross inequalities of assessment in Chicago, and the influence of politics in tax reduction, see H. D. Simpson, "The Tax Situation in Chicago," *Nat. Mun. Rev.*, XVII, 522-533, 594-599 (Sept.-Oct., 1928). Cf. Joint Committee on Real Estate Valuation, *A Study of Assessment Methods and Results in Cook County* (Chicago, 1927); H. D. Simpson, *The Tax Situation in Illinois*, (Chicago, 1929), and *Tax Racket and Tax Reform in Chicago* (Chicago, 1930).

of safeguarding its sources of revenue and of increasing the efficiency of its administrative machinery. Such considerations have led to the introduction of state central supervision in a large number of states, and with especially good results in the thirty-odd states that now have permanent tax commissions. In a few states, notably Massachusetts and West Virginia, this work is attended to by a single official or tax commissioner; but in most cases the commission is composed of either three or five members serving from four to six years, and usually appointed by the governor and senate.

Varied  
functions  
of state tax  
commis-  
sions

The more effective state tax commissions have been empowered (a) to supervise tax assessment and administration throughout the state, and (b) to make the assessment of certain kinds of property which are especially difficult to assess locally, for example, railroads, telegraph and telephone systems, express and sleeping-car services, and other public utilities. They have also taken over the equalization of assessments in the different counties or townships of the state, and issue instructions to assessors and other tax officials regarding the proper performance of their duties, including methods of procedure, accounting, and recording.<sup>1</sup> Counties are regularly visited, investigations conducted, prosecutions of delinquent officials or tax-payers instituted, and periodical reports submitted either to the governor or to the legislature. The powers exercised by these state commissions vary greatly, but the most effective instrument yet placed in their hands for controlling the work of local assessors consists of the right to investigate taxation conditions generally, to make intensive studies of the assessment work in particular localities, and, especially, to order a reassessment of particular pieces of property or of entire taxing districts.<sup>2</sup> "The work of state tax commissions has undoubtedly brought about in most states a very decided increase in the percentage of actual assessments to full value," and also a "diminution of the inequal-

<sup>1</sup> H. L. Lutz, "The State Tax Commission and the Property Tax," *Annals Amer. Acad. Polit. and Soc. Sci.*, XCV, 276-283 (May, 1921), and *The State Tax Commission* (Cambridge, 1918). By legislation enacted in 1919 and 1921, the Indiana tax board was authorized to allow or disallow budgets, or tax levies, voted by local taxing bodies; and also to approve or disapprove local bond issues in excess of \$5,000. P. Zoercher, "The Indiana Scheme of Central Supervision of Local Expenditures," *Nat. Mun. Rev.*, XIV, 90-95 (Feb., 1925); *ibid.*, XIV, 188-189 (Mar., 1925).

<sup>2</sup> The Illinois State Tax Commission has frequently ordered reassessments, the most important being the reassessment of all real estate in Cook county, in May, 1928. See *Nat. Mun. Rev.*, XVII, 690-696 (Nov., 1928); XVIII, 675-680, 681-689 (Nov., 1929).

ities between tax-payers and tax districts, and a general invigoration of the entire system of tax administration."<sup>1</sup>

From what has been said, it is clear that the general property tax is primarily a locally administered tax. This is not true of most of the other state taxes or other forms of state revenue, *e.g.*, taxes on the property of railroads. The assessment and collection of these state taxes are commonly entrusted either to the state tax commission or to some other state board or officer, such as the state treasurer or comptroller, and the tax rate is often fixed by law. Sometimes, however, there is a division of responsibility between state and local authorities in the assessment of corporate property. Thus, in Illinois certain portions of the real and personal property of all railroads, except the Illinois Central Railroad, are assessed by the local assessor, while the track (including buildings and improvements on the right of way), rolling-stock, and corporate excess are assessed by the state tax commission.

When the amount of state appropriations for a given period has been determined and the amount of revenue receivable by the state from all sources except the general property tax is approximately known, the tax rate for the state's share of the property tax is determined by arithmetical calculation. In some states the rate is fixed by the legislature, but in others by a state official or board.<sup>2</sup> The state tax, however, is only one of several taxes usually collected: a tax-payer's bill almost always includes also a county tax, a city, village, or township tax; and frequently, in addition to these, a tax for highways, for schools, for parks, and perhaps for still other purposes. This is due to the existence of overlapping areas of local government; and hence a citizen may find himself living in the jurisdiction of half a dozen, or even more, distinct taxing bodies.

The collection of the state's revenues, especially the portion arising from the general property tax, is usually placed in the hands of local officers, and the amounts received, in so far as they belong to the state rather than the local divisions, are transmitted by the county collector or treasurer to the state treasurer. The amount or proportion of money raised by the general property tax that goes into the state treasury for state purposes is rela-

<sup>1</sup> J. M. Mathews, *op. cit.*, 248. See *Municipal Research*, No. 81 (1917), "Some Results and Limitations of Central Financial Control;" J. A. Estey, "Indiana's Tax Reforms," *Nat. Mun. Rev.*, IX, 411-413 (July, 1920).

<sup>2</sup> In Illinois, the state tax rate is determined by the governor, state treasurer, and auditor of public accounts.



tively small; by far the greater part is retained by county and other local government units.<sup>1</sup> Local collection of state revenue is not economical, the expense involved sometimes consuming a large percentage of the gross proceeds. In contrast to this decentralized method employed in the assessment and collection of general property taxes are the methods employed for the collection of other state revenues. In the case of income taxes, for example, Wisconsin, Massachusetts, and New York have a highly centralized system. In the former state, the work is performed by forty-one income-tax assessors, selected according to merit principles, and assigned to that number of districts, where their work is done under the direction and supervision of the state tax commission. A large portion of the proceeds collected by these state officials is returned to the counties and other local government districts. Similar methods prevail in New York and Massachusetts.<sup>2</sup> Other state revenues are paid directly to the state officers authorized by law to receive them; but these revenues do not always go directly into the state treasury, for in some states the fees that are collected by the insurance commissioner or by the secretary of state, for example, are used to pay the expenses of the offices collecting them, and only the surplus, if any, is paid into the treasury.

The state treasurer and the state auditor or comptroller<sup>3</sup> are responsible for the safe-keeping and legal disbursement of the greater portion of the state funds. In about a dozen states, these funds are kept in the state's own vaults, and consequently no interest is derived from them. In the great majority of states, however, certain banks, located in different parts of the state, are designated as depositories of state funds; and all but four of these

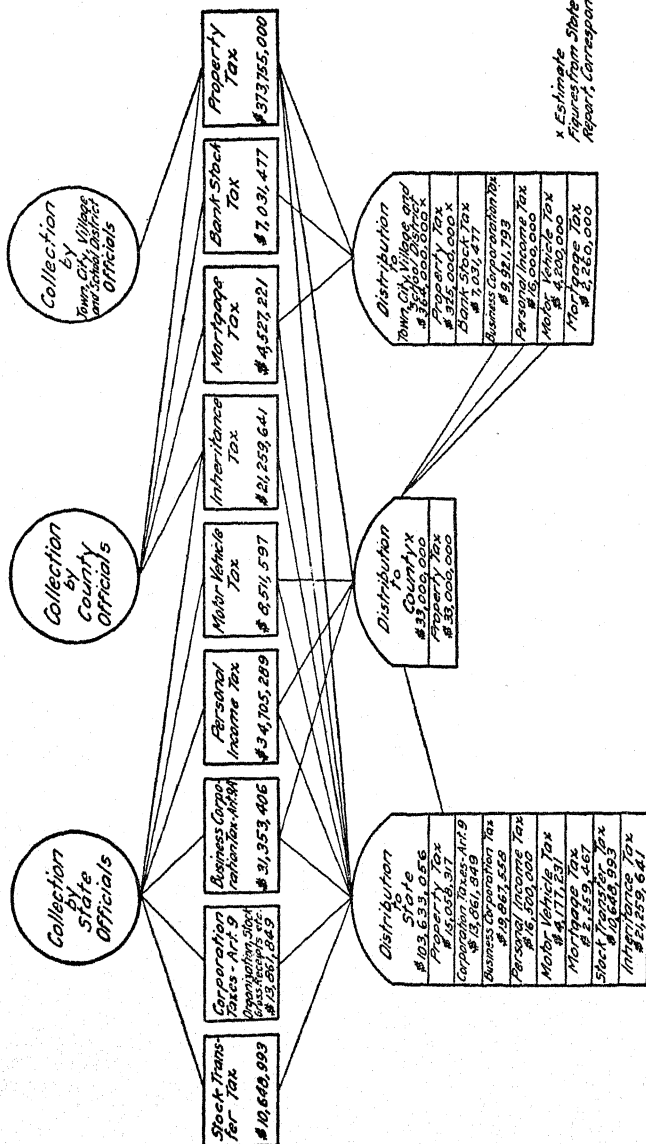
Custody of  
state funds

<sup>1</sup> In Illinois, in 1927, only seven per cent of the revenue accruing from taxation went to the state, the remainder being distributed as follows: school districts, thirty-eight per cent; cities and villages, twenty-five per cent; counties, nine per cent; roads and bridges, five per cent; park districts, seven per cent; sanitary, levee, and drainage districts, six per cent; townships, one per cent; and miscellaneous, two per cent.

<sup>2</sup> Wisconsin, New York, and Massachusetts are among the states which share the proceeds of the income tax with local government units. In most other states having income taxes, the receipts are used exclusively for state purposes. The same use is made of the proceeds of the inheritance taxes in thirty-seven states, while eight states share the receipts with local government units. In Nebraska, the levy and spending of inheritance taxes belong to the counties. Bureau of the Census, *Wealth, Public Debt, and Taxation: 1922*, "Taxes Collected," 10; *Report of the [New York] Special Joint Committee on Taxation and Retrenchment—Taxation Section* (1921), 23-47; National Industrial Conference Board, *State Income Taxes* (New York, 1930), II, 148-149.

<sup>3</sup> See p. 762 above.

## COLLECTION AND DISTRIBUTION OF TAXES IN NEW YORK STATE FOR THE FISCAL YEAR ENDING JUNE 30, 1920



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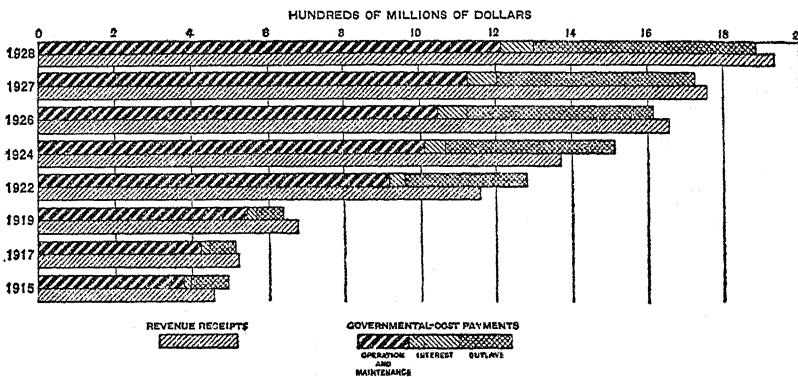
states receive interest on the state money deposited in such institutions.<sup>1</sup>

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State ex-  
penditures

From the varied sources of income described in the preceding pages the states received, in 1928, the aggregate amount of \$1,935,431,711. It is next in order to indicate, in very general terms, the objects for which this sum was expended. In the reports of the bureau of the census, state expenditures are grouped in three main divisions. (1) Interest payments on state debt amounted, in 1928, to \$86,928,560, or 4.6 per cent of the total state expenditure.

REVENUE RECEIPTS AND GOVERNMENTAL-COST PAYMENTS  
OF THE 48 STATES FOR SPECIFIED YEARS: 1915-1928



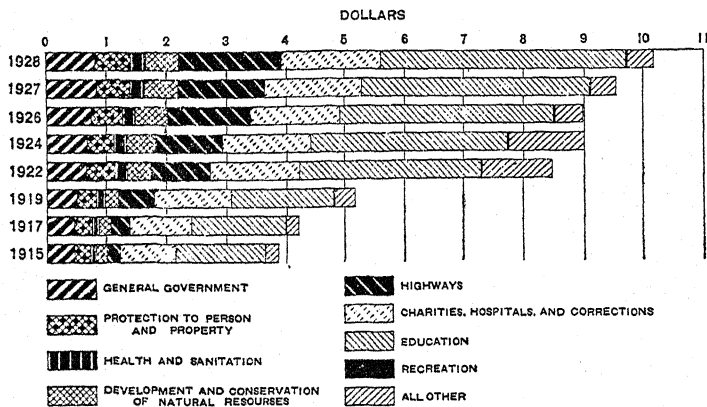
Reproduced, by permission, from the Bureau of the Census, *Financial Statistics of States*, 1928.

(2) Payments for outlays came to \$584,522,622, or 30.9 per cent of the total; these include amounts paid for the acquisition and construction of more or less permanent properties and public improvements, and for additions made to those previously acquired. But far in excess of these two items were (3) state expenses, or the payments for operation and maintenance of the general departments of the state government and of public service enterprises; together, these came to \$1,208,286,155, or 64 per cent of the total. Here one finds \$97,653,714 for the expenses of the legislative, executive, and judicial branches of the state government; \$70,138,503 for

<sup>1</sup> In 1919, the Illinois legislature passed a law providing for the selection of state depositories on a basis of competitive bids, for a full accounting of all interest earnings on state funds, and for giving publicity to all matters connected with the handling of state funds. *Laws of Illinois*, 1919, p. 954. See F. P. Gruenberg, "Interest on Public Deposits," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 147-155 (May, 1924); M. L. Faust, *The Custody of State Funds* (New York, 1925); "Irregularities in Custody of State Funds in Missouri," *Nat. Mun. Rev.*, XX, 74-77 (Feb., 1931).

the protection of person and property; \$66,111,569 for the development and conservation of natural resources; \$29,475,687 for health and sanitation; \$204,481,598 for highways; \$201,831,117 for charities, hospitals, and correctional institutions; \$480,649,771 for schools; \$2,199,926 for libraries; \$4,002,971 for recreation; and \$51,741,299 for miscellaneous purposes. To these totals for all of the states should be added \$9,435,200 spent by nineteen states for the operation and maintenance of public service enterprises.<sup>1</sup> The

PER CAPITA PAYMENTS FOR OPERATION AND MAINTENANCE  
OF GENERAL DEPARTMENTS OF THE 48 STATES FOR  
SPECIFIED YEARS: 1915-1928



The total per capita payments for operation and maintenance other than those for public service enterprises increased from \$3.85 in 1915 to \$10.18 in 1928, or 164.4 per cent.

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accompanying diagrams will show the per capita, and also the per cent, distribution of payments in recent years for the foregoing objects. The total expenditures were less than the total revenue receipts by \$46,259,174.

Having seen the diverse ways in which state funds are obtained, and the chief objects of state expenditure, we are brought to the point where a long-neglected, but exceedingly important, phase of the state financial system must be considered, namely, the methods by which money is allocated to, and expended by, the various officers, boards, commissions, and institutions.

Under conditions which prevailed in practically every state

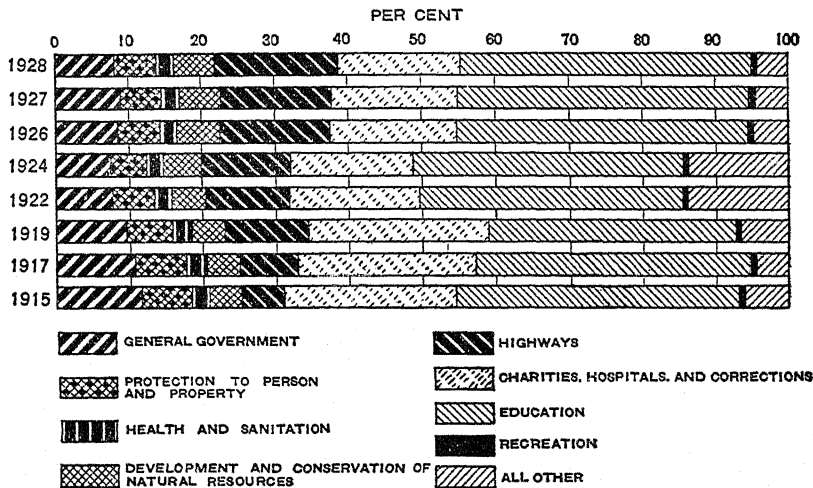
<sup>1</sup> See p. 788 above.

prior to 1913, and have not yet been entirely changed, it has been impossible either to make comprehensive plans for the distribution of public revenues among the several administrative activities or to control, in any strict and effective way, the use of state money or property. Every state officer has naturally magnified the importance of his own work, and has seen unlimited opportunities for new services to be rendered. Inevitably he has sought increased departmental appropriations. With almost unlimited demands

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Haphazard  
appropriation  
methods  
before 1913

PER CENT DISTRIBUTION OF PAYMENTS FOR OPERATION AND  
MAINTENANCE OF GENERAL DEPARTMENTS OF THE  
48 STATES FOR SPECIFIED YEARS: 1915-1928



Reproduced, by permission, from the Bureau of the Census, *Financial Statistics of States*, 1928.

pouring in from a hundred or more agencies and institutions, and with no method of balancing claims upon the treasury one against another, and of distributing appropriations on the basis of a full consideration of the interest and requirements of the state, unseemly scrambles for funds regularly took place whenever the legislature came into session. The departmental and institutional estimates were either merely "compiled" by some state officer, such as the treasurer or auditor, and transmitted by him to the legislature, or presented directly to the appropriation committees by the head of each state office or institution. No administrative officer acquainted with the entire business of the state reviewed these estimates, compared them, cut them down to agreed necessities, measured them against estimated revenues, and laid

a carefully prepared financial program before the legislature.

Furthermore, each member of the legislature was at liberty to introduce as many bills as he chose carrying charges upon the state treasury. From day to day, special appropriation bills would be passed by the legislature, with no responsible officer keeping tally or measuring their merits against the total expenditures and the estimated revenues of the state. One or two "general appropriation bills" providing for the support of the principal state offices or institutions, and sometimes containing thousands of items, would be made up by the appropriation committees of the house and senate. Rarely would these bills be brought out on the floor of the legislature for public discussion and criticism before the last few crowded days of the session;<sup>1</sup> and after a few hours devoted to rather perfunctory and ineffective criticism, they would be passed substantially as reported by the appropriation committees. Before or after the general appropriation bills had been disposed of, a large number of petty appropriation bills, carrying a considerable sum in the aggregate, would be rushed through with little scrutiny, and usually without debate.<sup>2</sup> Proposals to spend money came forward every year by the thousand, and their chance of adoption was not in proportion to their merits, but rather to the political influences behind them. When the legislature adjourned, no one knew definitely how much money had been appropriated.

In most states, the governor could veto separate items; hence it became a common practice to combine essential and doubtful appropriations in a single item, in order to prevent a veto. Without knowing what the total authorized expenditures for the next fiscal

<sup>1</sup> One of the most radical changes in legislative financial procedure was made in New York in 1917, when the general appropriation bill was completed and introduced by the middle of March, left open to all the members for inspection for two weeks, amended in open session on the floor, and advanced to final passage only after opportunity had been given for criticism. *Municipal Research*, No. 86 (1917). During the last two weeks of the Pennsylvania legislature of 1919, 434 appropriation bills were passed, aggregating \$88,000,000.

<sup>2</sup> The Illinois legislature passed 94 appropriation bills in 1913 and 88 in 1915, some of them containing hundreds of items. The majority were not reported from committees or passed until near the close of the session, when adequate consideration was impossible. In 1915, the discussion of the "omnibus appropriation" bills in the senate, carrying \$15,000,000, occupied only nine lines in the printed report of debates. The New York legislature, between 1916 and 1919 inclusive, passed 39, 81, 89, and 87 appropriation bills, respectively. *Report of N. Y. Reconstruction Commission* (1919), 3-10, 312. In the Pennsylvania legislature of 1921, over 600 petty appropriation bills were introduced; 450 of these passed and received the governor's approval. See L. P. Fox, *Pennsylvania's Appropriation Methods and Budget Systems in the State* (Philadelphia, 1922), 26-36.

period would amount to when the governor had finished vetoing bills and items, the legislature would pass the revenue bills which, in the meantime, had been prepared by other committees with little or no close relation to the work of the committees in charge of appropriations. Naturally, neither the governor nor the legislature could be held to a proper degree of accountability by the citizens of the state who had to foot the bills; and executive departments were often granted more money for the performance of their functions than the nominal head of the state government deemed necessary. With the initiative in matters of appropriation largely in the hands of several legislative committees—each considering separately and without adequate publicity a particular field of expenditure, and each subject to pressure of local interests and log-rolling methods—waste, extravagance, and deficits were inevitable.

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Relief from these conditions became imperative as the cost of government mounted, and it has been found, in greater or lesser degree, in the various plans of budgetary procedure which have been introduced in all the states since Wisconsin set the example in 1911.<sup>1</sup> Hardly any two of these plans are alike in detail; and there are some differences in fundamentals. The most important point of variation is the budget-making agency—in other words, the location of responsibility for the initiation of the budget or program of expenditures. On this basis, the systems fall into three fairly distinct classes.<sup>2</sup>

Budgetary  
reform

(1) Under the system adopted in Arkansas, in 1913, the budget is prepared and submitted to the legislature by a legislative committee; and a similar system was in use in New York between 1916 and 1921. In New York, at least, this arrangement resulted in no very marked improvement upon conditions prevailing previously.<sup>3</sup>

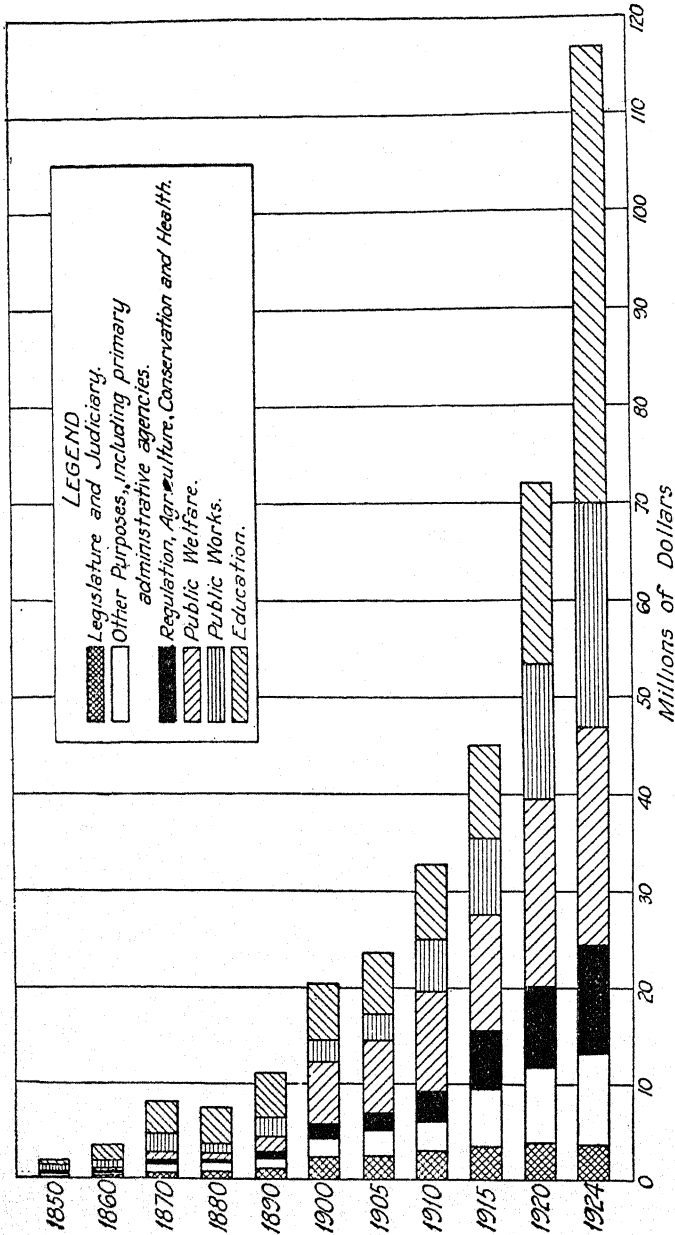
Different  
budget  
systems

<sup>1</sup> The movement for state budgetary reform is summarized in *Municipal Research*, No. 91 (1917), including bibliography; A. E. Buck, "The Present Status of the Executive Budget in the State Governments," *Nat. Mun. Rev.*, VIII, 422-435 (Aug., 1919), and "State Budget Progress," *Nat. Mun. Rev.*, X, 568-573 (Nov., 1921); R. Montgomery, "Budgetary Legislation in 1921," *Amer. Polit. Sci. Rev.*, XVI, 73-78 (Feb., 1922); "Budgetary Legislation in 1922," *ibid.*, XVII, 82-85 (Feb., 1923); "Budgetary Legislation of 1923," *ibid.*, XVIII, 102-106 (Feb., 1924); A. E. Buck, "Progress in State Budget-Making," *Nat. Mun. Rev.*, XIII, 19-25 (Jan., 1924), and "The Development of the Budget Idea in the United States," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 31-39 (May, 1924).

<sup>2</sup> The different budgetary laws down to 1919 and 1922, respectively, are analyzed in *Report of N. Y. Reconstruction Commission* (1919), Part IV; and L. P. Fox, *Pennsylvania's Appropriation Methods and Budget Systems in the State* (1922).

<sup>3</sup> In 1921, the New York legislature created a state board of estimate and control to be the budget-making authority. This board consisted of the gov-

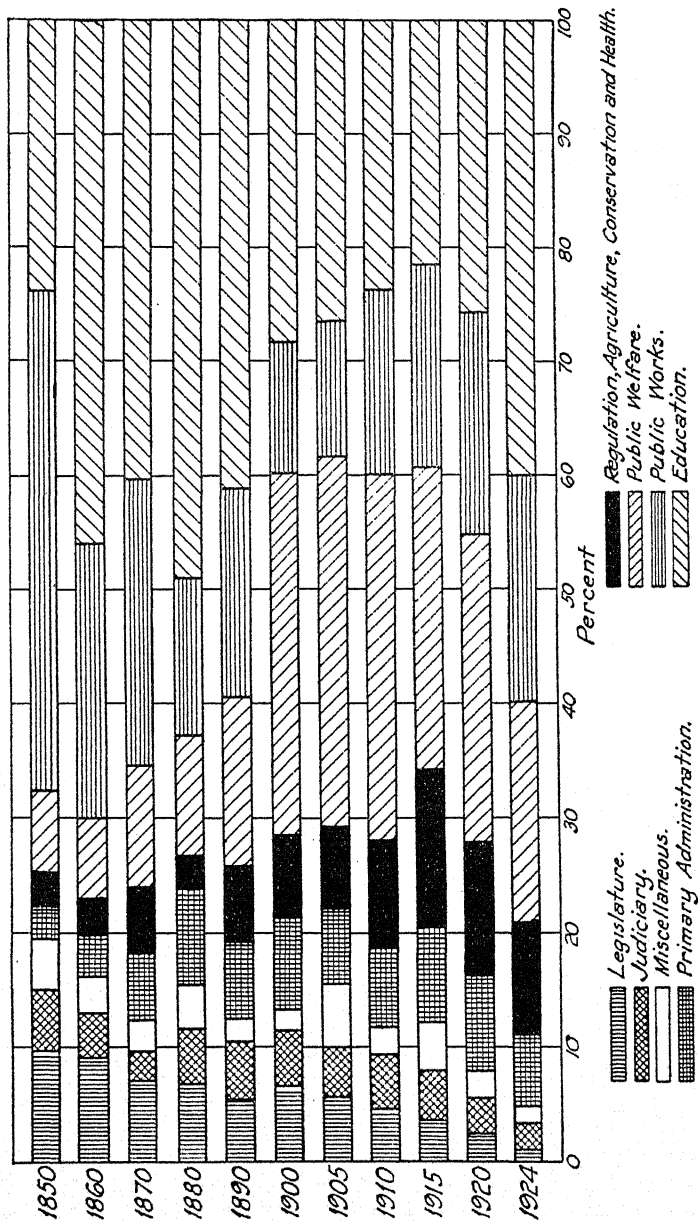
OPERATING EXPENDITURES OF NEW YORK STATE GOVERNMENT, 1850 TO 1924



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OPERATING EXPENDITURES OF NEW YORK STATE GOVERNMENT, 1850 TO 1925, SHOWING DIVISION  
ON 100 PER CENT BARS ACCORDING TO MAJOR FUNCTIONAL GROUPS



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(2) Fourteen states<sup>1</sup> have laws providing for budgetary boards or commissions, generally consisting of the governor and one or two other executive officers and a few members of the legislature, or made up solely of the principal executive officers. In Michigan, for example, responsibility for the budget has been placed upon the state administrative board consisting of the governor, secretary of state, auditor-general, treasurer, attorney-general, highway commissioner, and superintendent of public instruction. On the other hand, in Texas and Louisiana budget matters are handled by the board of control and the tax commission, respectively, each of which consists of three persons appointed by the governor for overlapping terms. In nearly all states having a budget board or commission, the governor is a member, or is in a position to exert some influence over the board through his appointees.

(3) The remaining thirty-three states have preferred what is called the executive type of budget, in which the governor is made more directly responsible for the formulation of the program of state expenditures.<sup>2</sup> The best-known systems in this class are those of Maryland, adopted by constitutional amendment in 1916, and Virginia, enacted by the legislature in 1918.<sup>3</sup> These two systems are broadly alike, yet with the important difference that Maryland

The  
executive  
budget in  
Maryland  
and  
Virginia

error, the chairman of the assembly ways and means committee and of the senate finance committee, and the state comptroller. Nevertheless, the legislative budget committee continued to function; requests for appropriations were addressed by the departments to both the new board and the old legislative committee, and both bodies compiled from them their estimates of necessary appropriations. In 1927, a constitutional amendment was adopted providing for an executive budget. On the controversy between Governor Roosevelt and the legislature over the first executive budget (1929), and the decision of the Court of Appeals, see *Nat. Mun. Rev.*, XVIII, 352-354 (May, 1929); XIX, 81-88 (Feb., 1930); *N. Y. Univ. Law. Quar. Rev.*, VII, 174-181 (Sept., 1929); *Amer. Polit. Sci. Rev.*, XXIV, 403-409 (May, 1930); and *Amer. Bar Assoc. Jour.*, XVI, 83-88 (Feb., 1930).

<sup>1</sup> Alabama (1919), Connecticut (1916), Florida (1921), Georgia, Kentucky (1918), Louisiana (1916), Maine (1919), Michigan (1921), Montana (1916), North Dakota (1915), Oregon (1913-21), Texas (1919), and Wisconsin (1911). Missouri adopted an executive budget system in 1921, but it was rejected in a popular referendum in 1922. The budget is now prepared by the state tax commission.

<sup>2</sup> New Hampshire, Rhode Island, and South Carolina are included in this third group, although their budgetary plans contain important variations from the true type of executive budget.

<sup>3</sup> California, Maryland, Massachusetts, Nebraska, New York, and West Virginia are the only states which have written budgetary provisions into their constitution. On the Maryland and Virginia systems, see A. E. Buck, "Operation of the Maryland Budget," *Amer. Polit. Sci. Rev.*, XII, 514-521 (Aug., 1918), and "The First Virginia Budget," *Nat. Mun. Rev.*, IX, 207-209 (Apr., 1920).

has placed strict limitations upon the power of the legislature to increase the amount of appropriations recommended by the governor and to pass supplementary and special appropriation bills; while Virginia has not done so. In Maryland, the legislature cannot, for example, amend the budget bill to change the school fund, or salaries and obligations required by the constitution. It may increase or decrease the items relating to the expenses of the legislature, or increase those relating to the judiciary; but it can only reduce or strike out other items.

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Although differing greatly in the means and methods employed, all state budgetary plans have as their main object the centralization of responsibility for the proposal of state expenditures, with a view to a reduction of the cost of operating the various branches of the government.<sup>1</sup> It is everywhere coming to be recognized that sound principles of budget-making are a most effective means of avoiding waste of public money, and, at the same time, of securing better service in public administration. A budgetary system which embodies simple and clear methods of stating the uses to which public funds are devoted also enables the voters and tax-payers more easily to grasp the relative importance of each group of expenses, and to know where the public money goes, what proportion is devoted to each state activity, and exactly what use is made of the appropriations granted to each of the state offices, boards, commissions, and institutions.

How  
budgetary  
reform  
tends to  
check  
waste

To be most effective in these directions, a budgetary system should embrace at least the following features: (1) Each state department, office, or institution should be required to submit to a central budget-making agency, two or three months before the meeting of the legislature, an estimate of its financial needs for the ensuing fiscal period, upon uniform sheets having items arranged in accordance with some uniform system of classification. (2) The central budget-making agency should then make a careful review, revision, and compilation of the estimates thus submitted; and to aid it in this work, it should be given a staff to conduct investigations and make reports. (3) At some time within the first few days of the legislative session, this budget-making agency should submit to the legislature a detailed financial statement, called the budget, which is simply another name for a comprehensive pro-

Essentials  
of an  
effective  
budgetary  
system

<sup>1</sup> A. E. Buck, "The Budget in the Model State Constitution," *Nat. Mun. Rev.*, X, 382-385 (July, 1921); National Municipal League, *A Model State Constitution* (1921), §§ 49-51, pp. 31-35.

gram of recommended expenditures and estimated revenues, arranged by departments and functions, and compared item by item with past expenditures and revenues. This should be accompanied by a balance sheet, a debt statement, and a statement of the financial condition of the state for each year covered by the budget. (4) All of the appropriations provided for in the budget should be consolidated in a single appropriation bill; unless, as in a number of states, the constitution requires that appropriation bills for salaries of state officers shall not include other items of expenditure. (5) The legislative committees should forthwith proceed to a consideration of the budget proposals, and should promptly report their appropriation bills in ample time to allow full debate, criticism, and amendment; and the bills should be passed well before the close of the session. (6) No supplementary or special appropriation bills should be enacted until after the final passage of the budget bills; and in all such cases a two-thirds or three-fourths vote might well be required.

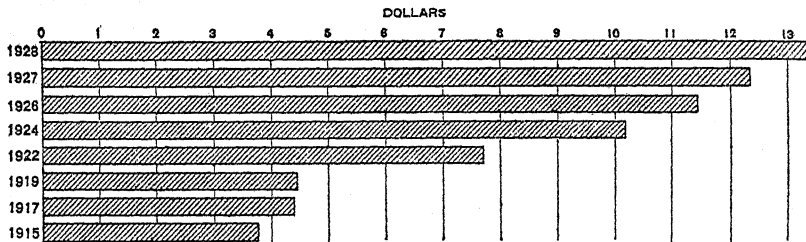
Most students of state government are agreed that the executive type of budget is far better calculated to achieve the desired economy in state administration than any of the other systems mentioned above. Nevertheless, to be thoroughly effective, any budgetary system must be accompanied by at least four other reforms: (a) the overhauling and reconstruction of the state administrative machinery, as explained in the preceding chapter; there can be no real executive responsibility for state expenditures until executive responsibility is established for the whole administrative system; (b) an alteration in legislative methods of handling appropriation and revenue measures—not only a closer coöperation between the budget-making agency and the leaders in the legislature, but also changes whereby appropriation measures in particular, instead of being parcelled out among several committees, shall be considered by a single committee in each house, or, preferably, by a joint committee of the two houses; (c) granting to the governor the right both to veto and to reduce single items in appropriation bills in order to overcome the seemingly irresistible tendency on the part of legislatures to spend money more freely than is needed;<sup>1</sup> and (d) the introduction of modern business methods in the purchase of services and supplies, the adoption of standardized and uniform accounting systems for all departments,

<sup>1</sup> Cf. R. H. Wells, "The Item Veto and State Budget Reform," *Amer. Polit. Sci. Rev.*, XVIII, 782-791 (Nov., 1924).

and the installation of improved methods of auditing and controlling expenditures. To a sound system of state finance, on the side of appropriations and disbursements, the clearing of the administrative jungle described in the preceding chapter is absolutely indispensable. As long as the state government includes a score or more of independent and uncontrolled offices, boards, and commissions, no adequate budgetary arrangements are possible. It is true that budgetary reform has gone forward rapidly in the past few years without waiting for the slower-moving processes of administrative consolidation to prepare the way; and

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PER CAPITA NET DEBT, AT THE CLOSE OF THE YEAR, OF THE  
48 STATES FOR SPECIFIED YEARS: 1915-1928



Reproduced, by permission, from the Bureau of the Census, *Financial Statistics of States*, 1928.

improved budgetary methods have been introduced in many states where practically nothing has been accomplished in the way of administrative reorganization. It is not to be expected, however, that under such circumstances the resulting economies will measure up to those which have appeared where administrative consolidation and budgetary reform have been undertaken conjointly.

A final phase of state finance which requires a word of comment is borrowing and indebtedness. Unlike the national government, whose borrowing power is unlimited, all but three state governments<sup>1</sup> are restricted in this matter by constitutional provisions<sup>2</sup> designed to prevent a recurrence of the reckless piling up of debts which marked the careers of state legislatures before the Civil War and during the Reconstruction period. Nevertheless, practically every state is now in debt; and the aggregate of these state debts has increased more than six hundred per cent in the past thirty years. In 1902, the total net debt of the states amounted

State debts

<sup>1</sup> Vermont, New Hampshire, and Connecticut. Until 1918, Massachusetts also had no constitutional debt limit.

<sup>2</sup> See pp. 710-712 above.

## 814 INTRODUCTION TO AMERICAN GOVERNMENT

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to \$234,965,000; in 1912, it was \$345,942,000; and by 1922 it had risen to \$935,544,000—an increase of 170 per cent in ten years. In 1928, it had mounted to \$1,584,564,765, an increase over the preceding year of \$139,637,571. Reduced to a per capita basis, state indebtedness rose from \$2.99 in 1902, to \$3.57 in 1912, and jumped to \$7.70 in 1922, and to \$13.35 in 1928. Growth of indebtedness, however, has not taken place in all of the states; between 1912 and 1922, eight actually reduced their net debt,<sup>1</sup> the largest decrease appearing in Massachusetts (\$2,555,000), the state which had the largest debt of all in 1912.<sup>2</sup>

<sup>1</sup> Massachusetts, Connecticut, Wisconsin, Kansas, Virginia, Georgia, Oklahoma, and Arizona.

<sup>2</sup> Bureau of the Census, *Wealth, Public Debt, and Taxation: 1922*, "Public Debt," 7, 10-17. The following table shows the amount of net and per capita indebtedness of the five states having the highest, and the lowest, amounts, respectively, in 1928:

*States with Highest Net Debt.*

	<i>Amount.</i>	<i>Per Capita.</i>
New York .....	\$259,602,471	\$21.45
North Carolina .....	162,548,025	53.54
Illinois .....	149,218,249	20.32
California .....	115,614,867	22.31
Pennsylvania .....	87,995,726	9.34

*States with Lowest Net Debt.*

	<i>Amount.</i>	<i>Per Capita.</i>
Arizona .....		
Nebraska .....		
Wisconsin .....	\$1,563,700	\$0.54
Nevada .....	1,597,532	18.01
Wyoming .....	1,599,498	7.29

*States with Highest Per Capita Net Debt.*

	<i>Per capita.</i>	<i>Amount.</i>
North Carolina .....	\$53.54	\$162,548,025
Arkansas .....	43.97	80,557,125
Oregon .....	36.78	33,860,261
Delaware .....	35.95	8,448,732
West Virginia .....	33.07	55,251,500

*States with Lowest Per Capita Net Debt.*

	<i>Per capita.</i>	<i>Amount.</i>
Arizona .....		
Nebraska .....		
Wisconsin .....	\$0.54	\$1,563,700
Indiana .....	0.65	2,062,500
Texas .....	0.76	4,266,722

See Bureau of the Census, *Financial Statistics of States* (1928); "The Debt of the State of New York, Past, Present, and Future," *Report of the Special Joint Commission on Taxation* (Mar., 1926); R. Turner, "Repudiation of Debts by the States of the Union," *Curr. Hist.*, XXIII, 475-483 (Jan., 1926); C. P. Howland, "Our Repudiated State Debts," *Foreign Affairs*, VI, 395-407 (Apr., 1928).

States borrow money, ordinarily, by issuing interest-bearing bonds running for a period of from ten to fifty years. These may take the form of either sinking-fund issues or serial issues, the two differing principally in the method provided for payment. Under the sinking-fund system, all of the bonds of a given issue mature at one time, and a definite sum is set aside each year from current revenues to meet the principal and interest. Serial bonds, on the other hand, mature in instalments or series, thus enabling a definite proportion of a given debt to be extinguished every year, or at other stated intervals, by payments from current revenues which, under the other system, would go into the sinking fund. Serial bond issues have grown rapidly in popular favor in the past two decades, and seem destined to supplant the earlier sinking-fund system.

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Bond  
issues

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## CHAPTER XXXVII

### THE STATE JUDICIARY

The last, and in some respects the most important, of the three coördinate branches of state government remains to be considered, namely, the judiciary. The state courts perform three very important functions: first, they provide an agency for the settlement of the estates of deceased persons, and an orderly method of adjusting disputes between individuals and between individuals and state or local governments; second, they constitute the sole instrumentality in time of peace for determining the guilt or innocence of persons accused of violating the criminal laws of the state; and third, they serve as the guardian of the constitutional rights of the citizen against infringement by the state government, and prevent the three departments of government from overstepping the boundaries marked out for each of them by the constitution. In not a few states, certain non-judicial duties of an administrative nature have also been imposed upon the judiciary, especially in connection with elections, the management of certain county affairs, the appointment of school boards, and the granting of certain licenses.<sup>1</sup>

Three important functions of the judiciary

Furthermore—although the fact is unappreciated by the general public—the state, and especially the federal, courts have increasingly become the managers of important businesses. Through their right to appoint receivers to take charge of and manage property, pending litigation, for the benefit of the owners, stockholders, or creditors, our courts are finding themselves indirectly engaged in the operation of railways, municipal transportation systems, mines, factories, and various other business enterprises; and in so doing they are required to pass upon questions of business administration, service, and personnel, supervise accounts, authorize bond issues and sales of property, and intervene in controversies with employers and labor unions over wages and working conditions. “They are as truly the business managers of the properties or enterprises

<sup>1</sup> The extent to which such administrative duties may be imposed upon the judiciary is limited in an indefinite way by the doctrine of separation of powers. The highest courts are commonly held to be exempt, but the inferior courts are often assigned work of this character.

which they are judicially guarding, as if the judges bore the title of president or superintendent."<sup>1</sup>

For the performance of these varied functions, every state has a more or less elaborate system of courts, some of which are created by the state constitution and have their jurisdiction defined with great particularity therein, while others are established and regulated only by act of the legislature.<sup>2</sup> Although in no two states is the system precisely the same, there is yet a considerable degree of uniformity, and a general description will hold true except in matters of detail.

The lowest courts are those held by justices of the peace, who are almost always men devoid of legal training, although now and then one hears of a lawyer serving in this capacity. As a rule, these justices are chosen by popular vote in townships or other subdivisions of the county; in three New England states, however, and in about an equal number of southern states, they are appointed by the governor. The jurisdiction of the justices usually extends throughout an entire county, and includes both petty civil and criminal cases. In Illinois, for example, their jurisdiction includes civil cases in which the amount involved does not exceed three hundred dollars and criminal cases which are punishable by fines not exceeding the same amount. Practically everywhere the justices may also issue warrants for the arrest of persons charged with criminal offenses, and may conduct preliminary examinations of persons accused of felonies; and, if the evidence seems to warrant, they may "bind over" such persons to await the action of the grand jury.<sup>3</sup> Justices may also solemnize marriages, administer

<sup>1</sup> W. MacDonald, *A New Constitution for a New America*, 192.

<sup>2</sup> Certain quasi-judicial powers are exercised also by state administrative boards, such as public utility and railway commissions, civil service commissions, and tax commissions.

<sup>3</sup> The importance of these preliminary hearings, and of the courts conducting them, is emphasized by the New York Crime Commission in a survey of felonies prosecuted in that state in 1925. One of the conclusions reached was that "the courts which actually count most in our system are not those highly respected and awesome tribunals where begowned justices or appeals supreme court justices sit, nor yet the county courts, where, throughout the land, criminal trials attract the interest of the newspaper-reading public, but the humble courts of the police magistrate and justices of the peace. Here, where justice usually sits in an atmosphere of disorder and inefficiency, and in the presence of a motley assemblage of the unfortunate, the rapacious, and the curious, most felony cases are passed upon and thrown out. If, as is usually understood, this court is a place for 'sifting' cases, throwing out the unimportant and unproved, and thus saving the time and energy of the trial court and the grand jury, it is hardly a satisfactory plan for real 'sifting.' If such preliminary work is not well done and habitual criminals are turned loose to return to their trade, new and serious crimes are the penalty society pays for slipshod pre-

oaths, and take the acknowledgment of many legal instruments. In contrast with practically all the other state and local courts, the justice courts have no clerks; no permanent official record is kept of their proceedings; and they have no official seal. They are, therefore, not "courts of record," as are the others. Furthermore, they may render a final decision in only the most petty misdemeanors and civil cases; in all other cases, appeal lies to the next higher courts.<sup>1</sup>

As might be expected from their lack of special training for judicial work, the justice which these officials administer is of a rough and ready, more or less informal, type. In the early history of the country, when means of travel to the county seat (where the higher courts dispensed justice at infrequent intervals) were difficult and time-consuming, the rural justices of the peace performed very useful functions as tribunals near at hand for the adjustment of minor differences between members of the same community. With the greatly improved means of travel and communication existing to-day in nearly all parts of the country, it may well be doubted whether the office of justice of the peace deserves to be continued.<sup>2</sup> In some localities, at any rate, the administration of it has been characterized by chicanery and extortion; and in some cities the office has been abolished entirely.<sup>3</sup>

Decreasing  
usefulness

liminary examinations. Moreover, this court is the court which touches the masses of the people. It is the people's court and if it functions badly a deep distrust of all justice is likely to result. As Charles Evans Hughes once said, "justice in the minor courts, effectively and wisely administered, is the best protection for the safety of our institutions." J. Knight, "Difficulties in Enforcing Criminal Law," *Curr. Hist.*, XXVII, 320-325 (Dec., 1927). See also H. Harley, "The Need for a Criminal Court," and "Efficient Local Courts," *Jour. Amer. Judic. Soc.*, III, 6-16 (June, 1919); "Remedy Proposed for Justices Courts," *ibid.*, XI, 30-31 (June, 1927); R. Walsworth, "To Establish Justice," *ibid.*, XIII, 151-152 (Feb., 1930).

<sup>1</sup> In Arkansas, Kentucky, and Tennessee, the justices of the peace of each county constitute the county court, which acts as the principal administrative board for county affairs. In New York, Michigan, and Illinois, justices of the peace act as members of the "town board" in their respective townships.

<sup>2</sup> In Iowa, where justices of the peace are elected by townships, less than half of the townships (408 out of 859) in the 53 counties from which reports were obtained in 1923, took the trouble to elect these officials. Although these townships were entitled to 1,719 justices, only 631 were elected, and many who were elected never qualified. See W. L. Wallace, "Constables and J. P.'s in Iowa," *Nat. Mun. Rev.*, XIII, 7-10 (Jan., 1924).

<sup>3</sup> In Chicago, for example, the practices of the justices of the peace became so intolerable that the office was abolished when the present municipal court was created in 1905. See *Ill. Const. Conv. Bull.*, No. 10 (1920), "The Judicial Department," 762 ff.; C. H. Smith, "The Justice of the Peace System in the United States," *California Law Rev.*, XV, 118-145 (Jan., 1927); A. B. Butts, "The Justice of the Peace—Recent Tendencies," *Amer. Polit. Sci. Rev.*, XXII, 946-953 (Nov., 1928). On justices of the peace in particular states, see No.

In incorporated villages and towns, it is common to find police magistrates with jurisdiction similar to that of the justices of the peace, but restricted to cases arising within the limits of the incorporated area. In small cities, provision is also made by law for special municipal or city courts, which are often called police courts. In some of the largest cities, the office of justice of the peace has disappeared within the city limits, and special municipal courts have been set up, consisting of numerous judges and having a wider jurisdiction than justices of the peace in both civil and criminal matters.<sup>1</sup> In addition to these strictly municipal courts, other trial courts having civil and criminal jurisdiction frequently exist within the same territory.<sup>2</sup> Frequently these courts have branches dealing with highly specialized classes of cases, such as juvenile courts and small claims courts.<sup>3</sup>

2. County  
courts

A county court is held at least once a year in practically every county in the country. In some states this court is called the court of common pleas, and in others the district, circuit, or superior court. Sometimes there is a single judge of the county court for each county, as in Illinois; but in other states it is not unusual to find two or more counties combined in a judicial circuit or district in which there are one, two, or even three circuit or district judges who, at stated intervals, hold a session of the county court in each county comprised in the circuit or district. On the other hand, in populous counties, one finds county, superior, or circuit courts with numerous judges of equal rank and jurisdiction.<sup>4</sup> The term of judges of the county court is rarely longer than four years; and in more than three-fourths of the states these judges are chosen by popular vote.

Jurisdic-  
tion

County courts almost invariably have original jurisdiction over all criminal cases, and, generally, final jurisdiction also in such cases in so far as questions of fact are concerned, although disputed questions of law may be carried on appeal to one or more of the higher courts. In the county court, also, persons accused of

*Car. Law Rev.*, VI, 349-354 (Apr., 1928); Ohio, *Jour. Amer. Jud. Soc.*, XIII, 25-27 (June, 1929); Tennessee, *Nat. Mun. Rev.*, XVIII, 225-227 (Apr., 1929); Connecticut, *ibid.*, XIX, 9-13 (Jan., 1930).

<sup>1</sup> Notably in Chicago, Cleveland, and Los Angeles.

<sup>2</sup> Notable results followed the reorganization of the criminal courts in Detroit. See *Jour. Amer. Jud. Soc.*, IV, 38-44 (Aug., 1920).

<sup>3</sup> See Chap. XLIV below.

<sup>4</sup> For example, in San Francisco county there are 16, and in Los Angeles county 38, superior court judges. In Cook county, Illinois, there are 48 circuit and superior court judges with almost identical jurisdiction. Cf. H. Harley, "A Model County Court," *California Law Rev.*, III, 1-13 (Nov., 1914).

crimes and bound over by a justice of the peace to await the action of the grand jury usually have their guilt or innocence determined. In civil cases, the county court commonly has unlimited jurisdiction, although in some states it is restricted to cases involving less than a stated amount. Its jurisdiction in civil cases is both original and appellate. The great majority of cases coming before it, however, are commenced in it; cases in which it has appellate jurisdiction are brought to it on appeal from decisions of justices of the peace or municipal courts. In some states, the judge of the county court also acts as probate judge in the settlement of the estates of deceased persons and in passing upon matters relating to the property, custody, and welfare of minor children and other persons under guardianship. In the most populous counties, however, a separate probate, surrogate, or orphan's court usually attends to such matters.<sup>1</sup> In several states, too, the county court has important administrative duties in connection with the enforcement of certain state laws or with some phases of county government.

The highest state court is almost always called the supreme court, although in New York it is called the court of appeals, and in New Jersey the court of errors and appeals; in both of these states there is a "supreme" court, but it is inferior to the courts just mentioned.<sup>2</sup> Usually the supreme court consists of from five to nine judges, who, as a rule, sit together in the hearing of cases, although in a few states the court is authorized to sit in sections. In any event, a majority of the whole number of members of the court or section must concur in any decision rendered.<sup>3</sup> The judges are usually elected, being chosen either on a general ticket or by districts; although under a third method candidates are nominated from different districts and voted for by the voters of the entire state. The term of office ranges all the way from life or during

3. Supreme  
courts

<sup>1</sup> In some New England states, there are no county judges, but the several judges of the superior (or supreme) court hold court in the different counties throughout the state, in addition to serving collectively as an appellate court. There are also special probate districts in each of which there is an elective probate judge.

<sup>2</sup> The state of Georgia had no supreme or other court for the correction of errors from 1776 to 1846. See J. P. Lamar, "History of the Establishment of the Supreme Court of Georgia," *Amer. Bar Assoc. Jour.*, X, 513-518 (July, 1924).

<sup>3</sup> The decisions of the supreme court, and, in some states, of the next inferior court also, are published regularly in volumes known as *Illinois Reports*, *Indiana Reports*, etc. The publication takes place under the editorial supervision of a reporter of decisions appointed by the court. See O. N. Carter, "Methods of Work in Courts of Review," *Ill. Law Rev.*, XII, 231-259 (Nov., 1917).

good behavior in Massachusetts, New Hampshire, and Rhode Island, and from twenty-one and fourteen years in Pennsylvania and New York, respectively, to two years in Vermont. In the last-mentioned state, however, it is customary for the legislature to reëlect a sitting judge as long as he is willing or physically able to serve. Six-year terms are the most common, being found in seventeen states.

## Functions

The work of the supreme court is almost wholly confined to hearing and deciding appeals upon questions of law which come up from the lower trial courts, although in a few special cases proceedings may be begun in the supreme court. The constitutions or statutes of eleven states also authorize the governor or the legislature, or both, to require the opinion of the supreme court judges upon important questions relating to the construction and constitutionality of existing or proposed legislation.<sup>1</sup> Ordinarily, however, the supreme court of a state, like the highest federal court, will express an opinion upon such matters only when the questions come before it in the ordinary course of litigation.<sup>2</sup>

## 4. Intermediate courts

Between the highest court and the trial or county courts, about one-third of the most populous states have established one or more intermediate courts, called superior, circuit, or appellate courts, whose judges are usually elected from a few large judicial districts into which the state is divided for this purpose. These intermediate courts may have original or appellate jurisdiction, or both. The cases in which they have original jurisdiction are often determined by act of the legislature and usually include, among others, contested election cases and civil cases involving large sums of

<sup>1</sup> Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, New Hampshire, North Carolina, Oklahoma, Rhode Island, and South Dakota. Before the Civil War, the state supreme courts frequently rendered advisory opinions, even in the absence of any constitutional authorization. The pronounced tendency in more recent years has been for them to refrain from giving extra-judicial advice when not required to do so by the constitution. In 1923, however, the supreme court of Alabama upheld as constitutional a mere statutory authorization of advisory opinions. A brief summary of this decision appears in *Amer. Polit. Sci. Rev.*, XIX, 565-566 (Aug., 1925). The best treatise on this subject is A. R. Ellingwood, *Departmental Coöperation in State Government* (Menasha, Wis., 1918). Cf. *Iowa Law Rev.*, XIII, 188-198 (Feb., 1928); *No. Car. Law Rev.*, VII, 449-452 (June, 1929); *Encyc. Soc. Sci.*, I, 475-480 (1930).

<sup>2</sup> In most states, the same judges administer both common law and equity; but in six there are separate courts of equity or chancery to handle cases to which, for one reason or another, common law forms of action do not apply. Some states also permit themselves to be sued in what are called courts of claims. New York has gone farther than most states in opening its court of claims to actions based upon both contract and tort. Where such a court does not exist, private appeals are often made to the legislature; and in some states this has been productive of grave abuses. See P. S. Reinsch, *Readings on American State Government*, 168-172.

money. As appellate courts, they hear appeals from the county or other inferior courts, and are often empowered to render final decisions in such cases in order to relieve the congestion of business before the supreme court.<sup>1</sup>

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XXXVII

All of the state courts which have been described exist quite independently of the system of federal courts established by the national constitution and by acts of Congress; there is no foundation whatever for the common notion that the highest state court is subordinate to the lowest federal court. Certain classes of cases may be commenced in either the state or the federal courts; and any case originating in a state court which involves the determination of any right claimed under the national constitution, laws, or treaties, may be transferred or carried on appeal to the federal courts.<sup>2</sup> The great majority of cases coming before the state courts do not, however, raise any such "federal question," but involve simply the adjudication of rights claimed under the state constitution, the state statutes, or the common law when not modified by state legislation.

State  
courts in-  
dependent  
of federal  
courts

Even a bare outline of the judicial machinery of the state should mention certain officers who assist the courts in the administration of justice. The attorney-general of the state often appears before the courts to represent the state in pending litigation; and sometimes he exercises a limited supervision over the enforcement of the criminal laws or the trial of criminal cases by the county prosecuting attorneys. The importance of the prosecuting attorney, and of the sheriff as the executive officer of the courts, will be more fully commented on in the chapters on county government.<sup>3</sup> Attached to all courts of record is an officer variously called a clerk, a register, or a prothonotary, sometimes appointed by the judges constituting the court, but in many states elected by popular vote. This official keeps the court records, issues legal processes as directed by the court, and is custodian of the court seal.

Court  
officials

Many civil cases are tried by one or more judges without a jury; but all of the state constitutions contain provisions guaranteeing trial by jury in most civil cases, unless waived by the parties to the suit, and also in all criminal cases with the frequent

The trial  
jury

<sup>1</sup> Cf. A. Kocourek, "Relief for the Appellate Courts; the Referendary System," *Jour. Amer. Judic. Soc.*, VII, 122-130 (Dec., 1923); G. F. McNoble, "Plan to Assist Appellate Judges," *ibid.*, IX, 185-188 (Apr., 1926); "Methods of Work in Appellate Courts," *ibid.*, VIII, 165-170; IX, 20-27, 49-56 (Apr., June, Aug., 1925).

<sup>2</sup> See pp. 493-494 above.

<sup>3</sup> Chaps. XXXIX-XL below.

exception of petty misdemeanors.<sup>1</sup> In most states, the trial jury is merely the judge of the facts in the case, the court itself passing upon all questions of law arising incidentally to the introduction of evidence before the jury or otherwise applicable to the case. In some states, however,—Illinois, for example—the jury is made the judge of both the law and the facts. At common law, the petit or trial jury consisted of twelve impartial men, and their unanimous agreement was required for the rendition of a verdict. This rule still prevails in a majority of the states; but in recent years modifications of the old jury trial, in both civil and criminal cases, have been adopted in about a third of the states. For example, the constitutions of twelve states now authorize civil trials, in courts of record, by juries of less than twelve persons; and seven states make similar provisions for criminal trials.<sup>2</sup> Nineteen state constitutions authorize verdicts by something less than unanimous vote (usually three-fourths) in civil cases; and seven states apply the same rule to most criminal cases, although in capital cases practically all states still require a unanimous verdict of a jury of twelve.

The grand  
jury

Like the petit jury, the grand jury has been inherited from English common law; but, unlike the petit jury, it has nothing to do with the actual determination of the guilt or innocence of persons accused of crimes: it is concerned almost exclusively with the commencement of criminal proceedings. Upon its own initiative, it may bring indictments against persons who, in its judgment, have violated the laws of the state. But in most instances the initiative is taken by the prosecuting attorney, who lays before

<sup>1</sup> Under a Connecticut law, passed in 1921, the accused in a criminal case is given the choice of a trial by the court or trial by jury. Since the law went into effect, only about thirty per cent of the criminal cases have been tried by jury. A similar choice has long been authorized in Maryland, and in 1923 98 per cent of the cases tried in the criminal court of Baltimore were tried without a jury. Not less than eight states sanction optional trial of felonies and misdemeanors without a jury: Connecticut, Indiana, Maryland, Michigan, New Jersey, Rhode Island, Washington, and Wisconsin. Four states (Connecticut, Indiana, Maryland, and Michigan) allow waiver of jury trial in capital cases. See C. T. Bond, "Maryland Practice of Trying Criminal Cases by Judges Alone, without Juries," *Amer. Bar Assoc. Jour.*, XI, 699-703 (Nov., 1925); W. M. Maltbie, "Criminal Trials Without a Jury in Connecticut," *Jour. Crim. Law and Criminol.*, XVII, 335-342 (Nov., 1926); P. Howard, "Trial by Jury," *Century Mag.*, CXVII, 683-690 (Apr., 1929); S. C. Oppenheim, "The Attack on the Jury," *New Republic*, LXI, 219-221 (Jan. 15, 1930); W. A. Goldberg, "Waiver of Jury in Felony Trials" (in Detroit), *Mich. Law Rev.*, XXVIII, 163-178 (Dec., 1929).

<sup>2</sup> In trials before justices of the peace, juries of six persons are authorized in some states.



the grand jury the evidence which, in his judgment, is sufficient to justify placing the accused person on trial. If the grand jury concurs, it endorses upon the draft indictment prepared by the prosecuting attorney the words "a true bill," and the foreman of the jury attaches his signature. If, on the other hand, the grand jury is not satisfied that the prosecuting attorney has sufficient evidence to make out a "prima facie case" against the accused, it generally instructs its foreman to endorse on the draft indictment "this bill not found." Proceedings before a grand jury are secret and wholly *ex parte*, or one-sided, unless the accused voluntarily submits to an examination before the body.

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XXXVII  
Indict-  
ments

At common law, the grand jury consisted of not fewer than thirteen nor more than twenty-three men, and the concurrence of twelve was necessary for the bringing of an indictment. State constitutions or statutes in almost a third of the states now provide for a smaller grand jury and a corresponding reduction in the number whose concurrence is required. In all but ten states, the constitution provides for the periodical summoning of the grand jury; and in the ten exceptions, similar provision has been made by statute. In earlier times, the institution of the grand jury furnished much-needed protection to the private citizen against arbitrary prosecution for alleged criminal offenses by officers of the crown; and throughout the early history of the states, indictment by grand jury was required for the prosecution of practically all crimes. Under modern conditions, however, the grand jury seems to be an unnecessarily cumbersome and expensive method of instituting criminal prosecutions; and we find that, although about half of the states still require indictment for all of the more serious offenses called felonies, the other half have departed in varying degrees from the old common-law practice. Some constitutions expressly authorize the abolition or modification of the grand-jury system by the legislature; others make prosecution by indictment or by information alternative processes, regardless of the seriousness of the offense.<sup>1</sup> In a half-dozen states in which indictment and information are alternatives, a grand jury may be called only upon an order of the judge of a court having power to try and determine

Diminished  
importance  
of the  
grand jury

Informa-  
tion

<sup>1</sup> California was one of the first states to authorize (1879) the prosecution of felony cases by information instead of indictment. In a murder case, it was contended that the new procedure violated the "due process" clause of the Fourteenth Amendment. The Supreme Court, however, held to the contrary, in *Hurtado v. California*, 110 U. S. 516 (1884). Cf. R. J. Miller, "Informations or Indictments in Felony Cases," *Jour. Amer. Judic. Soc.*, VIII, 104-120 (Dec., 1924).

felony cases. In such states, indictment by grand jury is rarely resorted to, and practically all criminal prosecutions are instituted by the process called information. Under this procedure, the prosecuting attorney files with the proper court a formal charge in which, upon his oath of office, he "gives said court to understand and be informed" that the crime described therein has been committed by the person therein named; and from this phraseology the process gets its name, "information."<sup>1</sup>

Defects of  
the state  
judicial  
system

When eminent leaders of the bar, able and respected judges of both state and federal courts, deans and professors of the best law schools, and an ex-president and chief justice of the United States<sup>2</sup> concur in pronouncing the organization of our state courts

<sup>1</sup> For further facts relating to the grand and petit jury systems, see *Ill. Const. Conv. Bull.*, No. 10 (1920), "The Judicial Department," 828 ff.; McLaughlin and Hart, *Cyclopedia of Amer. Govt.*, II, 268; "Grand Jury Reform," *Jour. Amer. Judic. Soc.*, IV, 77-82 (Oct., 1920); R. J. Miller, "Information or Indictments in Felony Cases," *Jour. Amer. Judic. Soc.*, VIII, 104-120 (Dec., 1924); "Michigan's 'One Man Grand Jury,'" *ibid.*, VIII, 121-123 (Dec., 1924); H. R. Keeble, "The Grand Inquest of the County," *Amer. Mercury*, V, 142-146 (June, 1925); J. E. Babb, "Problems of Trial by Jury," *Amer. Polit. Sci. Assoc. Proceedings*, IV, 240-245 (1907); C. P. Patterson, "The Jury System of the Southwest," *Southwestern Polit. Sci. Quar.*, IV, 220-237 (Dec., 1923); E. M. Sheridan, "Women and Jury Service," *Amer. Bar Assoc. Jour.*, XI, 792-797 (Dec., 1925); E. W. Brainerd, "Ladies of the Jury," *The Woman Citizen*, XII, 14-15 (July, 1927); Judge R. H. Day, of Ohio, on women jurors, in *U. S. Daily*, Nov. 25, 1929, p. 2473; Nov. 26, 1929, p. 2496 ff.

<sup>2</sup> President, later Chief Justice, Taft said in 1909: "It is not too much to say that the administration of criminal law in this country is a disgrace to our civilization, and that the prevalence of crime and fraud, which here is greatly in excess of that in European countries, is due largely to the failure of the law and its administration to bring criminals to justice." Quoted in M. Storey, *The Reform of Legal Procedure*, 3. See also R. B. Fosdick, *American Police Systems* (New York, 1921), Chap. I.

Problems of court organization and procedure, on the one hand, and crime prevention and punishment, on the other, are so interlocked that the following selected references will be found useful: J. T. White, "The Causes of the Crime Wave," *Amer. Bar Assoc. Jour.*, XIII, 726-732 (Dec., 1927); G. W. Kirehwey, "Crime Waves and Crime Remedies," *The Survey*, LV, 593-597 (Mar. 1, 1926); "What Makes Criminals?," *Curr. Hist.*, XXVII, 315-319 (Dec., 1927); *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXV, 1-264 (May, 1926), series of articles on "Modern Crime: Its Prevention and Punishment," *Curr. Hist.*, XXVII, 303-364 (Dec., 1927), symposium on "Crime Menace," *Amer. Year Book* (1928), 488-498; (1929), 488-498; J. Miller, "The Compromise of Criminal Cases," *South. California Law Rev.*, I, 1-31 (Nov., 1927); L. Veiller, "The Rising Tide of Crime," *World's Work*, LI, 133-143 (Dec., 1925); "The Menace of Paroled Convicts," *ibid.*, 363-375 (Feb., 1926); "Where American Justice Fails," *ibid.*, 499-509 (Mar., 1926); "The Way to War on Crime," *ibid.*, 602-609 (Apr., 1926); "Turning the Criminals Loose," *ibid.*, LIII, 546-555 (Mar., 1927); "Prisons or Men's Clubs—Which?," *ibid.*, LIV, 84-95 (May, 1927); C. C. Nott, "Coddling Criminals," *Scribner's*, LXXIX, 540-543 (May, 1926); H. L. Witmer, "The History, Theory, and Results of Parole," *Jour. Crim. Law and Criminol.*, XVIII, 24-64 (May, 1927); J. P. Bramer, *A Treatise Giving the History, Organization, and Admin-*

and their methods of administering justice in both civil and criminal cases sadly defective, if not in grave danger of breaking down, the average lay citizen may well become interested in the situation and in the remedies which are proposed. The criticisms most frequently directed against the state judicial system fall into three main groups. The first relates to the structure or organization of the courts, including the term for which judges are chosen, their compensation, and especially the method of selecting and removing them; the failure to develop highly specialized courts for the exclusive handling of certain classes of cases;<sup>1</sup> the overlapping jurisdiction of different courts, and the absence in most states of unity in judicial organization; a very general failure to recognize that the efficiency with which justice is administered depends largely upon proper provision for handling the administrative side of court work;<sup>2</sup> and the equally general failure to ensure centralized supervision over the work of judges of the different courts throughout the state, who at present are legally independent of one another and usually quite uncontrolled by any central directing head.

CHAP.  
XXXVII

1. As seen  
in the or-  
ganization  
of the  
courts

A second group of criticisms, although arising in part from the absence of a unified judicial system, relate chiefly to court procedure:<sup>3</sup> protests (a) against the absence of rule-making power

2. Defects  
in court  
procedure

*istration of Parole* (New York, 1927); G. W. Alger, *Report . . . on the Board of Paroles and Parole System . . . of the State of New York* (1926); F. L. Hoffman, "Murder as the Death Penalty," *Curr. Hist.*, XXVIII, 408-410 (June, 1928); M. A. Kavanagh and L. A. Lawes, "Does the Death Penalty Curb Crime?", *Curr. Hist.*, XXXIII, 356-366 (Dec., 1930); R. Moley, "Some Tendencies in Criminal Law Administration," *Polit. Sci. Quar.*, XLII, 497-523 (Dec., 1927); Illinois Assoc. for Criminal Justice, *The Illinois Crime Survey* (1929); summary of foregoing survey in *Jour. Crim. Law and Criminol.*, XIX, 1-109 (Aug., 1928); Law Assoc. of Philadelphia, *A Report of the Crime Survey Committee* (1926); J. M. Pfiffner, "The Activities and Results of Crime Surveys," *Amer. Polit. Sci. Rev.*, XXIII, 930-956 (Nov., 1929); R. Moley, *Politics and Criminal Prosecutions* (1929); A. F. Kuhlman, *A Guide to Material on Crime and Criminal Justice* (1929). For additional references, see third edition of this book (1928), p. 813, note.

<sup>1</sup> Except in some of our large cities, where highly specialized courts are to be found. See Chap. XLIV below. Cf. H. Harley, "Court Organization for a Metropolitan District," *Amer. Polit. Sci. Rev.*, IX, 507-518 (Aug., 1915).

<sup>2</sup> The term "administrative work" here refers to the preparation of jury lists, supervision of grand jury work, service of court processes, keeping records and transferring cases from one court to another, and the appointment and supervision of receivers, administrators, executors, referees, and masters in chancery. The problems of judicial administration are not unlike those connected with the state administrative departments.

<sup>3</sup> The non-professional student will find interesting and illuminating criticisms of court procedure in G. W. Alger, "Swift and Cheap Justice," *World's Work*, XXVI, 653-666 (Oct., 1913), and XXVII, 53-62, 160-175, 338-346, 424-432 (Nov., 1913, to Feb., 1914); "The Irritating Efficacy of English Criminal Justice," *Atlantic Mo.*, CXLII, 218-226 (Aug., 1928); *Acad. Polit. Sci. Proceedings*, X, 71-114, 179-224 (July, 1923); W. H. Taft, "Delays and

on the part of courts; (b) against the numerous petty limitations imposed upon the trial judge by legislative action; (c) against the frequent amendment, in some states, of the rules of court procedure by the legislature, often at the behest of litigants who hope thereby to gain some advantage in a particular case;<sup>1</sup> (d) against the inability of the trial judge to control the procedure in his court, as an English judge is able to do, or to comment upon the weight of evidence and the credibility of witnesses for the purpose of assisting juries;<sup>2</sup> (e) against the unlimited right of appeal which, in civil cases, works against the interest of the poor litigant and, in criminal cases, often defeats the ends of justice; (f) against the tendency of appellate courts to reverse decisions of lower courts upon purely technical grounds not affecting the merits of the case; (g) against the long delays in bringing criminal cases to trial (partly due to the cumbersome grand jury system), with the result that criminals often go scot free because of the death or disappearance of important witnesses; (h) against the unrestricted admission to bail of old offenders; (i) against the poor pay and poor quality of jurymen generally,<sup>3</sup> and the inordinate delays attending the selection or empaneling of juries in criminal cases; (j) against the long-drawn-out examination of witnesses and the unlimited number of objections to testimony permitted to counsel; (k) against the rule that the failure of the accused to testify may not be commented upon before the jury by the prosecution; (l) against the requirement of unanimous verdicts by juries; (m) against the rule in a few states permitting juries to be judges of the law as well as of the facts;<sup>4</sup> and finally

Defects in the Enforcement of Law," and J. W. Garner, "Crime and Judicial Inefficiency," both of which are reprinted in P. S. Reinsch, *Readings on American State Government*, 173-198.

<sup>1</sup> *Jour. Amer. Judic. Soc.*, IX, 122-125 (Dec., 1925), "Procedural Reform Calls for Rule-Making;" C. B. Whitten, "Regulating Procedure by Rules," *ibid.*, XI, 15-19 (June, 1927); E. R. Sunderland, "The Exercise of the Rule-Making Power," *Amer. Bar Assoc. Jour.*, XII, 548-552 (Aug., 1926); "The Rule-Making Power of the Courts," *ibid.*, XIII, Part II, 1-16 (Mar., 1927); "Expert Control of Legal Procedure through Rules of Court," *Jour. Amer. Judic. Soc.*, XII, 24-26 (June, 1928); J. Marvel, "The Rule-Making Power of the Courts," *ibid.*, XII, 24-26 (June, 1928), and "The Rule-making Power of the Courts," *Jour. Amer. Judic. Soc.*, X, 113-120 (Dec., 1926); *Amer. Bar Assoc. Jour.*, XII, 599-603 (Sept., 1926).

<sup>2</sup> Cf. G. M. Hogan, "The Strangled Judge," *Jour. Amer. Judic. Soc.*, XIV, 116-125 (Dec., 1930).

<sup>3</sup> Cf. *Transactions Common. Club of Cal.*, XV, 387-424 (Dec., 1920), "The Selection of Jurors;" C. N. Callender, *The Selection of Jurors* (Philadelphia, 1924); J. A. C. Grant, "Methods of Jury Selection," *Amer. Polit. Sci. Rev.*, XXIV, 117-133 (Feb., 1930).

<sup>4</sup> Criticisms and defense of the jury system will be found in the following

(n) against the absence of unified control over the various prosecuting officers throughout the state, resulting in uneven enforcement of criminal laws and lowered efficiency in the conduct of criminal prosecutions.

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Limitations of space permit the consideration of only four principal criticisms: the lack of unity throughout the judicial system, the methods of selecting judges, their removal from office, and the judicial veto on legislation.

In our study of state administration,<sup>1</sup> we have seen how highly important it is to have unified supervision and control over the various disjointed and disconnected administrative agencies. The same sort of supervision and control is essential to the most effective functioning of the state's judicial machinery. We are accustomed to speak of the state's judicial "system;" but in the great majority of commonwealths, it is a system only in name and in theory. Unified supervision and control is very generally unprovided, not only for the different courts throughout the state, but also for the judges making up any particular court. It seems self-evident that all of the courts comprised in the so-called judicial system should be closely articulated with one another, and that there should be some chief justice or judicial council to coördinate the work of the several courts and devise plans for an effective division of labor among them. Instead of this, we find in the majority of states "a jumble of disconnected and disjointed courts, each pursuing its own way, with little regard to any other."<sup>2</sup>

1. Dis-  
jointed  
court or-  
ganization

Likewise, in the case of any particular court, it seems equally self-evident that the maintenance of judicial efficiency calls for a chief justice or small committee of judges clothed with authority

references: L. Green, "Why Trial by Jury?," *Amer. Mercury*, XV, 316-324 (Nov., 1928); R. H. Elder, "Trial by Jury: Is It Passing?," *Harper's*, CLVI, 570-580 (Apr., 1928); R. Duane, "Should the Civil Jury be Abolished?," *Forum*, LXXX, 489-498, 791-792 (Oct.-Nov., 1928); *Congressional Digest*, VIII, 257-280 (Nov., 1929), a series of articles on "Should Our Jury System be Modified?," I. B. Oakley, "Sentimental Juries," *No. Amer. Rev.*, CCXXIX, 286-294 (Mar., 1930); K. M. Johnson, "Province of the Judge in Jury Trial," *Jour. Amer. Judic. Soc.*, XII, 76-82 (Oct., 1928); J. H. Wigmore, "A Program for the Trial of Jury Trial," *ibid.*, XII, 166-171 (Apr., 1929); R. T. Donley, "Trial by Jury in Civil Cases—a Proposed Reform," *ibid.*, XIII, 16-24 (Jan., 1929); R. N. Wilkin, "The Jury: Reformation, Not Abolition," *ibid.*, XIII, 154-156 (Feb., 1930); Judge Florence E. Allen, of Ohio, "Action to Remedy Defects of Jury System Proposed," *U. S. Daily*, February 17, 1930, p. 3517. For additional references, see third edition of this book (1928), p. 815 n. 2.

<sup>1</sup> See p. 776 above.

<sup>2</sup> W. N. Gemmill, "What Is Wrong with the Administration of Our Criminal Laws?," *Jour. Crim. Law and Criminol.*, IV, 698-711 (Jan., 1914).

to supervise the work of all judges belonging to that court, to require reports from them as to the state of business on their dockets, to admonish the careless and indolent judge, to relieve the overworked, and to keep them all reasonably busy. As matters stand, however, in nearly every part of the country the judges in the same court are elected independently of one another and seldom are made subject to any real directing or supervisory control. Each judge is thus legally independent of every other judge and of all together; he can hold court when he pleases, for as few hours a day as he pleases, and hear cases on such calendars as he pleases; whatever coöperation, teamwork, or division of labor exists depends almost wholly upon the voluntary coöperation of the judges constituting the court.

Lack of  
court  
statistics

With such a loose judicial organization, or lack of organization, it is not surprising that there are few reliable statistics showing what our different state courts are doing; so that of most of our states it may truly be said that "the judiciary is the one department which publishes no data bearing upon the efficiency of its work, and without such data there is no adequate basis for judging how well it is performing its duties or what changes are needed to increase its efficiency."<sup>1</sup> In connection with the administration of criminal justice, this absence of complete judicial statistics is particularly unfortunate, since it leaves us often without the means for coördinating the few and unsystematic figures kept by the police, jailors, magistrate's courts, the higher criminal courts, the prosecutors, and the wardens of penal and reformatory institutions. In this respect we are said to be generations behind other civilized nations. "Without statistical records our system has no memory. It does not know what it has done heretofore, or the consequences of its actions, or what it should do in the future. . . . We do not know what classes of people contribute to various kinds of crime; we do not know what various judges do with respect to sentencing; we do not know what the results of various kinds of treatment and administration are."<sup>2</sup> There must be some central judicial author-

<sup>1</sup> W. R. Potter, president of the Michigan Bar Association, in *Jour. Amer. Judic. Soc.*, VI, 168 (Apr., 1923).

<sup>2</sup> H. Harley, "Criminal Justice and How to Achieve It," *Nat. Mun. Rev.*, XI, Supp., 14-16 (Mar., 1922). "We want to know more than we now know concerning the number of crimes that are reported to public authorities in this country. That is the measure of crime. We want to know what happens to those who are arrested . . . what happens to these cases thus initiated . . . how many drop out in the preliminary hearings . . . how many drop out in the next stage. Then . . . we want to cross reference these facts and correlate them in order to determine, so far as possible, what degree of efficiency our agencies

ity if we are to have efficient coöperation among the different courts and among the score or more of judges attached to them; we must have some central judicial head; and it is through such a controlling headship that essential judicial statistics can be obtained, correlated, and interpreted most successfully.<sup>1</sup>

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Until late years, substantially the same defects as those enumerated above characterized the organization and work of the various federal courts; but we have seen that an act of Congress passed in 1922 paved the way for a close coördination, more adequate supervision, and equalization of the work of those tribunals.<sup>2</sup> Happily, too, it may be said that an important beginning of reform along similar lines has appeared in some states. In a dozen states, including Louisiana and Michigan, the constitution vests in the supreme court "a general superintending control" over all inferior courts—a power which, however, has rarely been employed to bring about any notable measure of unification and coördination. More noteworthy progress in this direction has been made in Massachusetts (1924), California (1926), and nearly a score of other states,<sup>3</sup> where judicial councils have been established whose duty it is to collect and study court statistics, to formulate rules for the equalization and more efficient handling of court business, and to recommend to the legislature needed changes in

Beginnings  
of reform

for the prosecution of criminals are attaining. . . ." R. Moley, quoted in *Curr. Hist.*, XXVII, 306 (Dec., 1927). See also L. N. Robinson, *Criminal Statistics in the United States* (Boston, 1927); "Criminal Statistics and Identification of Criminals," *Nat. Mun. Rev.*, XVI, 769-777 (Dec., 1927); L. D. Upson, "The 'Squeal Book'," *ibid.*, XVI, 695-699 (Nov., 1927).

<sup>1</sup> Excellent articles dealing with various aspects of judicial reform, especially those related to the structure and organization of the courts, will be found in the bi-monthly issues of the *Journal of the American Judicature Society* (357 East Chicago Ave., Chicago), and the numerous bulletins published by this society, whose object is the promotion of the efficient administration of justice.

<sup>2</sup> See p. 501 above. Cf. S. U. Loo, "Administration of Justice in Hawaii," *Jour. Amer. Judic. Soc.*, XII, 111-116 (Dec., 1928).

<sup>3</sup> Ohio, Oregon, and Maryland (1923), Washington (1924), North Carolina (1925), North Dakota, Connecticut, Kansas, and Rhode Island (1927), Kentucky and Virginia (1928), Michigan, Illinois, Idaho, Pennsylvania, and Texas (1929). Unsuccessful efforts to establish a judicial council or other unifying agency have been made in a few other states. The judicial council movement is perhaps the most important development in connection with state courts during the past decade. The growth of the movement and the work of judicial councils may be studied in the following articles: "Experience with Judicial Councils," *Jour. Amer. Judic. Soc.*, XII, 83-91 (Oct., 1928); "Judicial Council Movement," *ibid.*, XIII, 38-44 (Aug., 1929); J. C. Ruppenthal, "The Work Done by Judicial Councils," *ibid.*, XIV, 17-30 (June, 1930); J. A. C. Grant, "The Judicial Council Movement," *Amer. Pol. Sci. Rev.*, XXII, 936-946 (Nov., 1928); F. R. Aumann, "The Ohio Judicial Council Embarks on a Survey of Justice," *ibid.*, XXIV, 409-415 (May, 1930).

the laws governing court organization and procedure. More thoroughgoing reforms in most states, however, will have to await the adoption of constitutional amendments. The goal toward which advocates of judicial reform are working is the consolidation of all the different courts into one court for the entire state, the existing courts serving merely as branches of this unified state court, as is shown in the accompanying diagram. Each of these branch courts, or divisions, would work under the constant supervision of either a chief justice or a small council of judges representing the main divisions of the court; and to this head of the judicial system every judge would be required to make periodical reports upon the business transacted in his court.<sup>1</sup> It is believed by those in a position to speak with authority that such a reorganization of the state judicial system would enhance its general usefulness incalculably.

2. Selection  
of judges—  
popular  
election

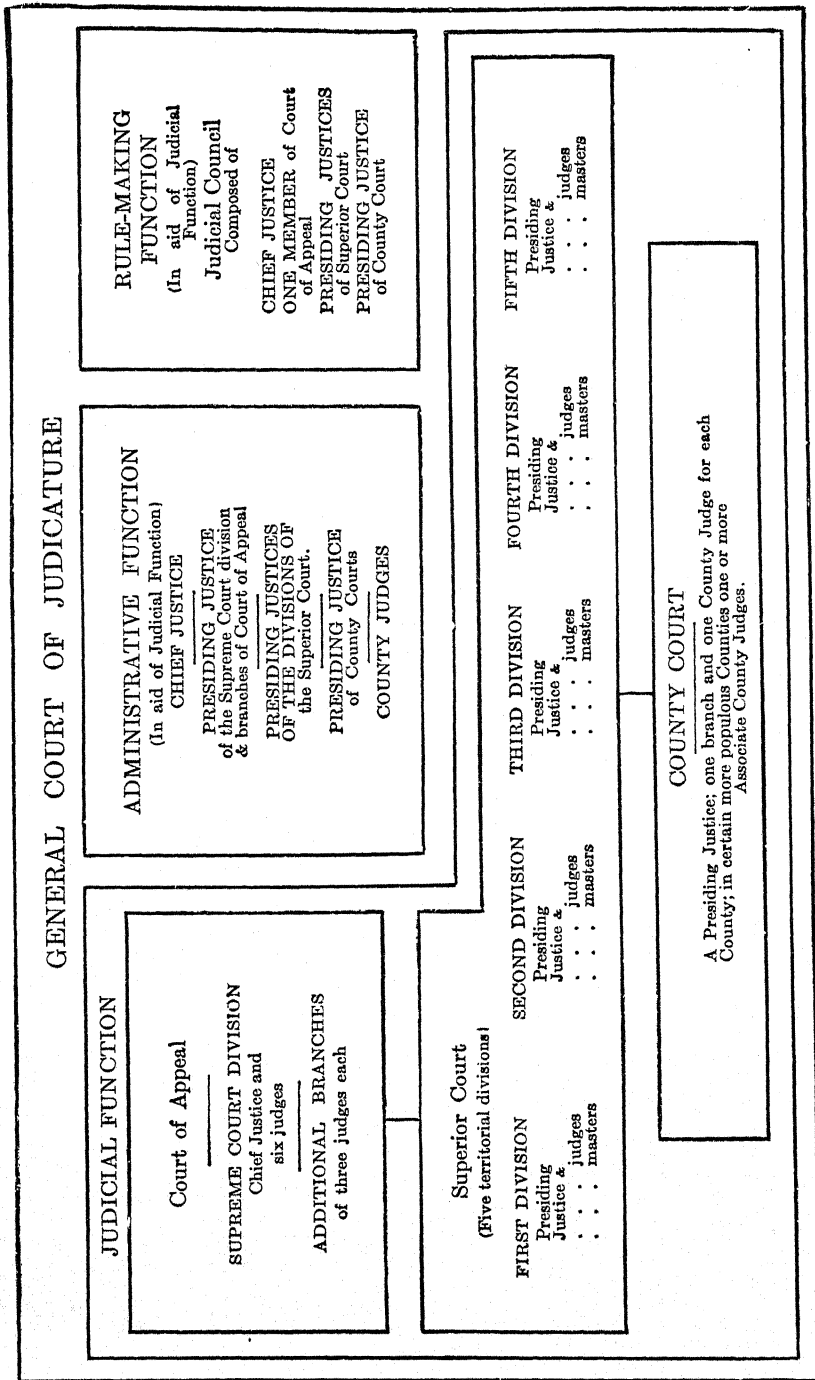
A matter of even more frequent criticism than the lack of unification in the judicial system is the prevailing method of selecting judges. In the early history of the country, judges were chosen by the legislature or appointed by the governor with the concurrence of the executive council or the senate. These methods are now retained in only ten states;<sup>2</sup> in the others, the judges of practically all courts are chosen by popular vote. Professional as well as lay opinion is somewhat divided on the wisdom of this method, but "information collected from a large variety of representative sources of professional opinion seems to indicate that in only three out of the thirty-eight states that elect judges by popular vote are the results considered to have been generally satisfactory—these being Maryland, Iowa, and, in a special degree, Wisconsin.

<sup>1</sup> The "model state constitution" proposed by the National Municipal League provides for a general court of justice, as a single court for the entire state, divided into three departments for handling different kinds of cases, *i.e.*, the supreme court, the district court, and the county court. At the head of the general court is a chief justice appointed by the governor for a ten-year term, and clothed with real supervisory and directing authority over all the associate judges. A judicial council is also provided for, representing all parts of the judicial system, and having extensive power to make rules of pleading and practice, subject to modification or veto by the legislature. See §§ 52-71, pp. 36-39; R. Pound, "Organization of Courts," *Jour. Amer. Judic. Soc.*, XI, 69-83 (Dec., 1927); also "Draft of Model Act Pertaining to Organization and Structure of Courts," *ibid.*, XI, 99-116 (Dec., 1927); XI, 145-154 (Feb., 1928).

<sup>2</sup> In four states (Vermont, Rhode Island, Virginia, and South Carolina), the judges of the highest courts are chosen by the legislature; in six states (Maine, Massachusetts, New Hampshire, Connecticut, Delaware, and New Jersey), they are appointed by the governor, subject to confirmation by the executive council, the senate, or the legislature; in the remaining thirty-eight states, they are elected by the people.



# DIAGRAM SHOWING UNIFIED STATE COURT



*(Courtesy of the American Judicature Society)*

In five others—New York, Pennsylvania, Michigan, Minnesota, and Missouri—the system is said to give fair satisfaction; and in all the rest there are different grades of professional dissatisfaction with it.”<sup>1</sup>

Long experience has disclosed two inherent weaknesses of the elective system: first, in populous communities, especially in metropolitan districts, popular election is no more likely to result in the choice of persons qualified to perform the highly technical work required of the judiciary than it is to secure the selection of experts in other branches of state government or in the field of municipal administration;<sup>2</sup> second, what passes under the name of popular election of judges is often such in only the most superficial sense, being in reality nothing more than a method of appointment by politicians who succeed in putting their judicial “slates” through a so-called non-partisan primary, or through party primaries, or through nominating conventions. All that is generally left for the voter to do on election day is to endorse one or the other of two judicial tickets thus submitted by irresponsible persons who are not primarily interested in the efficient administration of justice,<sup>3</sup> and who, therefore, often fail to pick candidates having the qualities most needed in a judge, namely, unquestioned integrity, dignity, independence, judicial temperament, and adequate legal training for highly technical duties.<sup>4</sup>

<sup>1</sup> J. P. Hall, “The Election, Tenure, and Retirement of Judges,” *Jour. Amer. Judic. Soc.*, III, 37-52 (Aug., 1919); L. Hand, “The Elective and Appointive Methods of Selecting Judges,” *Acad. Polit. Sci. Proceedings*, III, 130-140 (1913).

<sup>2</sup> “The chief objection to choosing judges by popular vote lies in the fact that a judge, in addition to any other qualifications, must possess certain technical knowledge and experience. However high his character, however sound his general intellectual equipment, however wide his acquaintance with business or public affairs, he must also possess a technical knowledge of the law and of legal procedure. To ask the public at large to pass upon a question of technical fitness in the case of a lawyer is as inappropriate as it would be to ask for a similar judgment regarding the technical fitness of an engineer, or a doctor, or a musician . . . the determination of technical fitness is obviously a task in which only a comparatively few persons can helpfully take part. . . .” W. MacDonald, *A New Constitution for a New America*, 182-183.

<sup>3</sup> Sometimes, however, the politicians overreach themselves. This happened in Chicago, in 1921, when the Thompson-Lundin machine in control of the city government set out to capture the twenty circuit court judgeships in the June election. The effort roused the community as few political incidents have done in recent years and resulted in overwhelming defeat for the machine. See A. C. Miller, “How the Chicago Bar Association Walloped the Spoilsmen,” *Jour. Amer. Judic. Soc.*, V, 46-52 (Aug., 1921).

<sup>4</sup> It may be said that, in general, we have in our judiciary extraordinarily competent and highly qualified judges, but that, on the other hand, we have judges who are incompetent, and deficient both in learning and judicial ability. For a searching criticism of judicial qualifications and methods, see the preface

Despite widespread and well-justified dissatisfaction with the practical workings of popular election of judges, the system has become so firmly entrenched in the popular mind, and has contributed so greatly to the influence of certain political leaders, that there seems little prospect of an early return to either the method of legislative election or that of executive appointment. Most of the newer plans on the subject have, therefore, sought to combine the best features of popular election with some method of appointment designed to ensure open and official responsibility.<sup>1</sup> One of these plans proposes simply that whenever an important judgeship is to be filled, the governor shall be permitted to nominate a candidate for each vacancy, in addition to any other nominee that there may be. The voters would then have an opportunity to elect the governor's candidate if he seemed a better man than any one of the candidates put up by the unofficial party leaders. Another proposal gives to the members of the state bar association, who presumably are better fitted than the politicians to pick properly qualified judicial candidates, a similar privilege of nomination. It is interesting to note, in passing, that in the state where popular election appears to have worked most successfully, namely, Wisconsin, this result is attributable mainly to an extra-legal practice whereby judges are virtually nominated by the bar association. Doubtless each of these two plans would operate most successfully where judges are elected on non-partisan ballots.

A third plan, repeatedly urged as a constitutional amendment in California, authorizes the governor to nominate all judges not later than July first of the year in which a judicial election occurs.

to J. H. Wigmore, *A Supplement to a Treatise on the System of Evidence* (2nd ed., Boston, 1915). Cf. W. N. Cohen, "In the Seats of the Mighty," *Jour. Amer. Judic. Soc.*, XIV, 110-113 (Dec., 1930).

<sup>1</sup> In other countries, appointment in some form is almost universally employed. See H. Harley, "Taking Judges Out of Politics," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXIV, 184-197 (Mar., 1916); "How Shall Judges Be Chosen?," *Jour. Amer. Judic. Soc.*, III, 75-90 (Oct., 1919); G. B. Harris, "Taking Judges Out of Politics," *Jour. Amer. Judic. Soc.*, VIII, 258-262 (June, 1924); Report of Committee, "Who Shall Choose Our Judges?," *ibid.*, VIII, 48-57 (Aug., 1924); "Selection of Judges," *Transactions Common. Club of Cal.*, IX, 305-350 (June, 1914); "Appointment of Judges," *ibid.*, X, 150-179 (Apr., 1915); "Judicial Elections," *ibid.*, XXII, 329-364 (June, 1927); H. J. Laski, "Technique of Judicial Appointment," *Jour. Amer. Judic. Soc.*, X, 39-46 (Aug., 1926); Cleveland Bar Assoc., "Report Recommends Appointment of Judges," *ibid.*, X, 177-183 (Apr., 1927); "Should the Bar Choose Judges?," *ibid.*, XIII, 134-135 (Feb., 1930); C. E. Watson, "Let Elected Commissions Choose Judges," *ibid.*, XIV, 13-15 (June, 1930); *Jour. Amer. Judic. Soc.*, XIV, 144-158 (Feb., 1931), "Selecting Judges in Large Cities."

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Proposed  
substitutes  
for popular  
election

At the November election, the people of the state, or of the judicial district concerned, would vote to confirm or reject the governor's nominations, a majority of those voting on the question being necessary to confirmation. If a nominee were rejected, the governor would be required to appoint some other person to fill the vacancy until the next election. This plan "has most of the advantages of an outright appointment by the governor, but leaves the ultimate control with the voters, plus the very desirable feature that the nominee is not running against somebody, thus greatly diminishing the prospect of extraneous considerations influencing the electorate."

The most radical plan recently proposed is the popular election of a chief justice in each court for a moderate term, and appointment by him of the other judges in his court as vacancies arise; such appointments to be for life unless, at stated intervals, the people should vote to retire any particular judge or judges. Three years after his appointment, the name of each judge would go on a judicial ballot with the question, "Shall he be retained or retired?" Unless a majority voted to retire him, he would remain in office. Again, seven years later, the same question would be asked, and again ten years thereafter. Thus in twenty years the voters would have three chances to retire a judge thought by them to be unfit. But the judge would never run against any one, or on any party ticket; he would run only against his own record. The chief justice would presumably be chosen largely upon the basis of his fitness to choose good associate judges, with the result that these judges would probably be very carefully selected. Furthermore, each judge would serve a probationary period before a popular verdict was rendered on his work; and from that popular verdict all irrelevant considerations, such as the personal popularity of some rival candidate, would be eliminated.<sup>1</sup>

### 3. Removal of judges:

The question of how to retire from office judges who prove incompetent or unworthy of public confidence presents a problem of peculiar difficulty, and no state has solved it in a way that meets with anything like general approval. The ideal method of removal

<sup>1</sup> For further discussion of these proposed methods, see *Jour. Amer. Judic. Soc.*, especially Vol. III, 37-52 (Aug., 1919), 75-90 (Oct., 1919); A. M. Kales, "Methods of Selecting and Retiring Judges in a Metropolitan District," *Annals Amer. Acad. Polit. and Soc. Sci.*, LII, 1-12 (Mar., 1914); *Amer. Judic. Soc. Bull.*, VI, reprinted as *Mass. Const. Conv. Bull.* No. 16 (1917), and also in *Jour. Amer. Judic. Soc.*, XI, 133-144 (Feb., 1928); "The Selection and Retirement of Judges," *Transactions Common. Club of Cal.*, IX, 305-350 (June, 1914); *ibid.*, X, 150-179 (Apr., 1915).

must be one which can be put into operation without undue delay, and which at the same time ensures for the judge whose removal is sought a fair hearing before a tribunal free from partisan bias and not subject to the influence of waves of popular passion. Three or four principal methods now in use in the different states fail, in varying degrees, to meet these requirements.

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Where judges are selected by popular election, retirement may be effected by refusal of the party leaders to approve the renomination of a judge, either because they regard his character or work as unsatisfactory, or because they desire to provide a place on the bench for some political friend; and wherever political organizations are strong this refusal is usually decisive.<sup>1</sup> If, furthermore, the party leaders see fit to permit or sanction a judge's renomination, he may be retired by failure of the voters to reëlect him. Popular election, however, is quite as likely to bring wrong results as right ones, for it often happens that a judge whose work on the bench has been entirely satisfactory is defeated for reëlection by circumstances wholly unrelated to his record as judge; for example, because of the greater personal popularity or capacity for self-advertisement of some less qualified rival candidate; or because some overshadowing issue in state or national politics, wholly unconnected with the judicial election, has swept down to defeat the entire party ticket on which his name appeared. Furthermore, popular election furnishes a means of retiring an unworthy judge only at a given time, *i.e.*, at the expiration of his term of office.

By failure  
to renomi-  
nate or  
reëlect

In most states, judges may be removed before the close of their term only by impeachment proceedings begun in the lower house of the legislature and tried before the senate, a two-thirds vote of the latter usually being required for conviction and removal.<sup>2</sup> The constitutions of twelve states, however, provide for removal by the legislature; and in nine other states the governor can remove, upon address of the legislature, after the English manner.<sup>3</sup> Neither impeachment nor legislative removal is without serious defects.

By im-  
peachment  
or by  
legislative  
removal or  
address

<sup>1</sup> See W. R. Smith, "Politics and the Judiciary," in P. S. Reinsch, *Readings on American State Government*, 158-167.

<sup>2</sup> In Nebraska, impeachment proceedings must be instituted by a joint session of the two houses, and the supreme court acts as the trial body, except when a judge of the supreme court is impeached; in that case, the impeachment court consists of all the district court judges of the state.

<sup>3</sup> L. A. Frothingham, "Removal of Judges by Legislative Address in Massachusetts," *Amer. Polit. Sci. Rev.*, VIII, 216-221 (May, 1914). One-third of the states have constitutional or statutory provisions permitting the retirement of judges on account of age or physical infirmity. See "Provisions for Judges' Retirement," *Jour. Amer. Judic. Soc.*, X, 91-94 (Oct., 1926).

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Under either method there is much delay, and partisan considerations are likely to exert an improper influence. Furthermore, evidence sufficient to convince two-thirds of the senate or legislature may be hard to obtain; and the offense may not be grave enough to be a crime, while yet being sufficiently serious to warrant public condemnation and impair the judge's usefulness. In actual practice, it has been found that impeachment and legislative removal do not work, and that unfit judges have remained on the bench because no other modes of removal were available.

By a recall  
election

This experience has led eight states<sup>1</sup> to adopt the drastic remedy of authorizing the holding of a special election in which the voters may recall the judge whose removal is sought. The people of these states have, however, rarely availed themselves of their power of recall. In no state has the device been invoked against a judge of a superior or supreme court; and no judge has been recalled because of popular dissatisfaction with a decision involving any question of constitutional interpretation.<sup>2</sup>

4. Judicial  
veto of  
legislation

Another prolific source of criticism of state courts, among both lawyers and laymen, is their power to declare state laws null and void because inconsistent with some provision of the state constitution. In recent decades, this veto power has been exercised with increasing frequency. The tendency may be explained in part by the minuteness with which the newer constitutions define the organization and functions of the various branches of the government; in part, by the incorporation in the constitution of matters which more properly belong in the sphere of legislative discretion; and especially by the attempt to set precise metes and bounds to the activity of the legislature, thus rendering the work of law-making the hazardous occupation described in an earlier chapter.<sup>3</sup> The experience of Illinois and other states shows that the cases in which the constitutionality of legislation has been challenged before the courts have multiplied as the number of restrictions on the legislature have been increased by successive revisions of the constitution.<sup>4</sup>

<sup>1</sup> Arizona, California, Colorado, Kansas, Nevada, North Dakota, Oregon, and Wisconsin.

<sup>2</sup> A. N. Holcombe, *State Government in the United States* (2nd ed.), 449. On two different occasions, judges of the municipal court in San Francisco have been recalled, namely, in 1913 and 1921. See "A Judge Recalled by Women's Votes," *Literary Digest*, XLVI, 1048 (May 10, 1913); and P. Eliel, "Corrupt Judges Recalled in San Francisco," *Nat. Mun. Rev.*, X, 316-317 (June, 1921).

<sup>3</sup> Chap. xxxii above.

<sup>4</sup> The greater part of this increase occurred in the last thirty years, the cases arising between 1890 and 1913 outnumbering those which arose in the

The state courts originally used the judicial veto principally to protect their own constitutional rights. In more recent years, however, they have used it mainly "to condemn the fruits of incorrect legislative procedure and especially to maintain the integrity of 'due process of law.'"<sup>1</sup> Most of the protests against the judicial veto have been prompted by decisions nullifying social and economic legislation on the ground that it amounted to the taking of property or a deprivation of liberty without due process of law; and the dissatisfaction arising from these decisions has been deepened by the prevailing uncertainty as to the meaning of the phrase "due process." Whether or not a given law will be upheld under this clause depends, not upon any definitely ascertainable standard or definition as to what constitutes due process, but upon the economic and political views of the members of the court at the time the case comes up for decision. Under such circumstances, the judiciary not only exercises judicial authority but determines questions of public policy as well. In other words, the judicial servants of the people have come to exercise a political power which enables them, if they are so minded, to defeat the public will as expressed in legislation—at all events, until the state constitution has been amended, or until the court has been reconstituted with judges holding different views of what is good public policy.

As a result of this situation, one finds not only the leaders of organized labor but able and prominent lawyers advocating the curtailment of the political power of the judiciary by one means or another.<sup>2</sup> Perhaps the most obvious remedy would be a shortening of the state constitution through the elimination of matters of a legislative nature, together with the detailed restrictions upon the legislature. Another remedy might take the form of establishing a time-limit of one year from the enactment of a statute, after which the law might not be attacked in the courts merely because of defects connected with its form or technique, or because of irregularities attending its passage through the legislature.

seventy years preceding 1890. See *Ill. Const. Conv. Bull.* No. 10 (1920), "The Judicial Department," 847 ff.; B. F. Moore, "The Judicial Veto and Political Democracy," *Amer. Polit. Sci. Rev.*, X, 700-709 (Nov., 1916).

<sup>1</sup> Between 1870 and 1913, there were 115 cases before the Illinois supreme court under the due process clause, and considerably more than one-half of these cases arose after 1900.

<sup>2</sup> G. E. Roe, *Our Judicial Oligarchy* (New York, 1912); W. L. Ransom, *Majority Rule and the Judiciary* (New York, 1912); W. F. Dodd, "The Growth of Judicial Power," *Polit. Sci. Quar.*, XXIV, 193-207 (June, 1909); A. M. Kales, *Unpopular Government in the United States* (Chicago, 1914), Chap. xvii.

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"Due  
process"  
as a source  
of dissatis-  
faction

Possible  
checks  
on the  
judicial  
veto

But perhaps the most satisfactory check on the judicial veto of social and economic legislation would be the omission from the state constitutions of the so-called due process clause or its equivalent. As the state supreme court is the final judicial interpreter of the state constitution, the due process clause now means just what the supreme court of each state interprets it to mean. With forty-eight different state courts interpreting identical clauses, due process is found to mean one thing in one state and another thing in another state, and something still different when the federal supreme court interprets an identical clause in the national constitution.<sup>1</sup> State supreme courts have frequently annulled legislation when practically identical laws have been upheld by other state courts, and by the federal Supreme Court under the due process clause of the Fourteenth Amendment. Criticism of the exercise of the judicial veto would, therefore, largely disappear with the omission of the due process clause from the state constitutions, thereby leaving the protection of private rights mainly to the federal courts, guided by the precedents of the national Supreme Court. In the opinion of good lawyers, there are no rights under state due process clauses which are not quite as adequately safeguarded under the federal due process clause.<sup>2</sup>

<sup>1</sup> For examples, see A. M. Kales, *op. cit.*, 204-207.

<sup>2</sup> See *Ill. Const. Conv. Bull.* No. 10 (1920), "The Judicial Department," 852-853. Three states, Ohio, North Dakota, and Nebraska, have adopted constitutional amendments requiring an extraordinary majority of the supreme court to declare a law unconstitutional. The Ohio amendment of 1912 requires the concurrence of at least all but one of the judges of the supreme court, except in affirming decisions of lower appellate courts declaring a law unconstitutional. See W. R. Maddox, "Minority Control of Court Decisions in Ohio," *Amer. Polit. Sci. Rev.*, XXIV, 638-648 (Aug., 1930); *U. S. Daily*, Sept. 27, 1930, p. 2318. In North Dakota, a similar amendment, adopted in 1918, calls for the concurrence of at least four of the five judges constituting the supreme court; and the Nebraska amendment of 1920 requires the concurrence of five out of the seven supreme court judges. In Minnesota, a like proposal, requiring the concurrence of five out of seven judges, was submitted to popular vote in 1914 and rejected. See *Ill. Const. Conv. Bull.* No. 10 (1920), "The Judicial Department," 850 ff.

In 1912, Colorado adopted a constitutional amendment providing for the "recall," or popular review, of judicial decisions, on lines advocated by ex-President Roosevelt in an address before the Ohio constitutional convention in that year. In 1921, however, the supreme court of the state held that the amendment was in conflict with the national constitution, and therefore invalid. For a summary of this decision, see *Amer. Polit. Sci. Rev.*, XV, 413-415 (Aug., 1921). On the recall of judicial decisions, see T. Roosevelt, "The Judges, the Lawyers, and the People," *Outlook*, CI, 1003-1007 (Aug. 31, 1912); W. D. Lewis, "A New Method of Constitutional Amendment," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLIII, 311-325 (Sept., 1912); "The Recall of Judicial Decisions," *Acad. of Polit. Sci. Proceedings*, III, 37-47 (1913); W. F. Dodd, "Social Legislation and the Courts," *Polit. Sci. Quar.*, XXVIII, 1-17 (Mar., 1913).



In concluding our study of the state judicial system, brief mention should be made of two important recent developments. Hitherto, our legal system has largely confined its remedial work to the redress of wrongs after their commission, and agencies of what has been well described as "preventive justice" have remained almost entirely undeveloped. Only within very narrow limits has it been possible to clear up *in advance* of hostile litigation any doubt as to the legal status of persons, the title to property, or the meaning of a contract. The last few years, however, have shown that people are coming to understand that "a system of law that will not prevent the doing of a wrong, but only affords redress after the wrong is committed, is not a complete system, and is inadequate to the present needs of society; that whenever a person's legal rights are so uncertain as to cause him potential loss or disturbance, the state ought to provide instrumentalities of preventive relief to remove the uncertainty before a loss or injury has been sustained."<sup>1</sup> In recognition of these facts, the legislatures of about one-third of the states, beginning with New Jersey in 1915, have adopted what are known as "declaratory judgment" statutes,<sup>2</sup> broadening the field of preventive justice by permitting the courts to declare existing rights and duties before actual cause for a hostile law-suit has arisen.

The courts have always favored the settlement of legal disputes by arbitration, or compromise, after the trial has commenced; but almost contemporaneously with the adoption of declaratory-judgment laws, legislation has appeared authorizing less formal, time-consuming, and expensive methods of adjusting legal disputes than

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Preventive  
justice:

1. The de-  
claratory  
judgment

2. Concili-  
ation and  
arbitration

<sup>1</sup> E. M. Borchard, "The Declaratory Judgment," *New Republic*, XXV, 192-194 (Jan. 12, 1921); "The Declaratory Judgment—a Needed Procedural Reform," *Yale Law Journal*, XXVIII, 1-32, 105-150 (Nov.-Dec., 1918); W. F. Dodd, "Preventive Justice," *Amer. Bar Assoc. Jour.* VI, 144-147, 151-153, (Nov., 1920).

<sup>2</sup> These laws are summarized in *Amer. Polit. Sci. Rev.*, XV, 261-264 (May, 1921); *ibid.*, XVIII, 305-312 (May, 1924). The declaratory judgment law of Michigan (1919) was held unconstitutional by the supreme court of that state (1920) on the ground that it imposed non-judicial duties upon the judiciary; see *New Republic*, XXV, 218-219 (Jan. 19, 1921). The Wisconsin law of 1919 was repealed in 1921 on the advice of the attorney-general of the state, following the Michigan decision. These are the only states in which such statutes have been held unconstitutional. A list of cases where declaratory judgment statutes have been upheld is given in *Amer. Polit. Sci. Rev.*, XX, 587, n. (Aug., 1926). The New York law reads as follows: "The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration, whether or not further relief is or can be claimed, and such declaration shall have the force of a final judgment." New York Civil Practice Act, § 473.

prevail in ordinary judicial proceedings. Small-claim courts have become very common, especially in cities; and special courts of conciliation and arbitration have been set up, or existing courts have been empowered to adopt rules providing for conciliation and arbitration.<sup>1</sup> Conciliation takes place when parties to a dispute reach an accord through the mediation of a third party called the conciliator. Such an agreement, however, is not legally enforceable in the courts in case one party should fail to abide by it. In arbitration proceedings, on the other hand, the parties submit their controversy to a third party, called the arbitrator, and agree in advance to be bound by his decision; and his award is enforceable by either side like the judgment of a regular court.<sup>2</sup> Not the least of the merits to be found in these newer judicial agencies is the fact that all tend to encourage a spirit of good will and friendliness between the parties to a dispute, and so to prevent the development of the animosity and rancor which usually attend hostile litigation.

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<sup>1</sup> A notable instance is found in the Municipal Court of the City of New York. See E. J. Lauer, "Keeping Civil Disputes Out of the Courts," *N. Y. Times*, Jan. 13, 1918; *Jour. Amer. Judic. Soc.*, IV, 165-168 (Apr., 1921); *ibid.*, VII, 7-14 (June, 1923); *ibid.*, VIII, 247-257 (June, 1924); *ibid.*, IX, 57-60 (Aug., 1925); *ibid.*, IX, 67-95 (Oct., 1925); *ibid.*, X, 122-126 (Dec., 1926); *ibid.*, XI, 85-93 (Oct., 1927); *Amer. Arbit. Assoc., Year Book on Commercial Arbitration* (New York, 1927); *Literary Digest*, LXXXII (Sept. 6, 1924), 42-44; *Amer. Polit. Sci. Rev.*, XVIII, 760-772 (Nov., 1924); *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXXVI, 54-59 (Mar., 1928).

<sup>2</sup> In 1925, Congress passed an act making "valid and enforceable written provisions or agreements for arbitration of disputes" in foreign or interstate commerce, except those involving seamen, railway employees, and other workers in interstate and foreign commerce. See "The United States Arbitration Law and Its Application," *Amer. Bar Assoc. Jour.*, XI, 153-156 (Mar., 1925).

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## CHAPTER XXXVIII

### PARTIES AND ELECTIONS

National  
party lines  
in state  
government

The principal executive officers and members of the legislature in practically all of the states, as well as a large majority of the judges, are nominated and elected as members of one or another of the two or three great national political parties which together have the support of probably nine-tenths of the voters of the country; and most of the elective county, city, and local officers are chosen because of similar party attachments.

To many people, this projection of national party lines into the field of state and local politics seems not only illogical but inexplicable, unjustifiable, and responsible for much of the inefficiency of state and local governments. And it has to be admitted that it is not always easy to perceive any logical connection between the conduct of state, county, and municipal government and Republican and Democratic policies relating to national affairs. Administrative consolidation, budgetary and tax reform, reorganization of state judicial systems, the form and activities of city governments—these and other issues appear to have not the remotest connection with Republican, Democratic, or Socialist views on the currency, the tariff, the relations of the United States with Mexico or with the League of Nations, or with the question of government ownership and operation of railroads or other public utilities. Moreover, looking about, one may find plenty of cities in which local officials are sitting harmoniously around the council-table and efficiently administering the fire, police, health, educational, and other activities of their local governments, despite the fact that on such national issues as have just been mentioned they entertain the most widely divergent views. So far as their city's affairs are concerned, these officials appear to find the term Republican, Democrat, or Socialist quite irrelevant, if not altogether meaningless. How, then, is to be justified, or at least explained, this presence of the great national party organizations, not only as active, but usually as dominant, forces in state and local politics?

An explanation, although it may not be an adequate justifica-

tion, is not far to seek. In the first place, the importance of the national government, the far-reaching significance of national party issues, the exalted position of the presidency, the dramatic and often spectacular methods employed in national campaigns, and the varied and fervent appeals to the electorate combine to rouse a keener interest and to stimulate a larger participation in national, than in purely local and state, elections. To the national party with which the ordinary citizen becomes identified in such campaigns, there soon springs up a permanent attachment, an abiding loyalty, a zealous devotion, against which purely local or state parties rarely have found it possible to prevail. Secondly, regarded from the viewpoint of national party leaders, the maintenance of national party organizations as active participants in state and local elections is a preparedness measure for the great presidential battles occurring once in four years; and also for the hardly less important congressional campaigns occurring midway between presidential elections. Inasmuch as the states constitute the basic units for the election of these national officers, state political organizations inevitably form the basic units in the national party system. State and local officers also are often elected concurrently with national officers, as well as in the intervals between national elections; hence, national party activity in connection with the nomination and election of state and local officers serves to keep the national organization more alert and active, recruited more nearly up to its maximum strength, the different parts better articulated and running more smoothly, than if it were called into service only once in two or four years. Moreover, a steadily increasing proportion of people in most states now live in cities; hence, from the point of view of party leaders at least, the party's chances of winning the great national campaigns will be materially enhanced if the national organization can maintain from year to year in every important city well-organized units led by veterans trained in local political skirmishes.

Finally, a partial justification for national party activity in state and local governments is to be found in the fact that many of our most serious municipal problems, such as poverty, unemployment, child labor, high cost of living, physical degeneracy, water supply, sewage disposal, and especially the immigration, naturalization, and Americanization of aliens, cannot be solved—indeed the solution of some of them can scarcely be even commenced—by cities without the coöperation of both state and

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Explan-  
ation of  
national  
party  
activity  
in the  
states

Interrela-  
tion of  
national  
and local  
problems

national governments, which really means the coöperation of national political parties.<sup>1</sup> A noteworthy and highly commendable tendency has appeared in some parts of the country in recent years for national party organizations to include in their state platforms definite declarations or programs concerning important problems primarily of state and local interest or concern. Wherever this is done in good faith, the terms Republican, Democrat, Socialist, come to have a real significance apart from their national connotations.

Movement  
for non-  
partisan  
elections

Notwithstanding this explanation and partial justification, many people are convinced that the existence of national party lines in state and local politics has been productive of more evil than good; and that, in particular, it has been largely to blame for the existence in many populous communities of unscrupulous and corrupt political machines masquerading under the name Republican or Democrat. To such proportions has this feeling grown in the past two decades that numerous efforts have been made to divorce national and state party activities. Many states now have some provision for holding state and local elections, so far as practicable, in the intervals between national elections, in the hope that local issues will thus be determined solely upon their own merits, unclouded by national considerations, even though the state officials continue to be elected as Republicans, Democrats, or Socialists. Another step in the same direction has been the adoption of the non-partisan ballot, *i.e.*, a ballot bearing no indication of the party affiliations of candidates, for the nomination and election of many city and county officers, judges of municipal or state courts, some of the principal state executive officials, and members of the legislature in Minnesota.<sup>2</sup>

<sup>1</sup> C. A. Beard, "Politics and City Government," *Nat. Mun. Rev.*, VI, 201-206 (Mar., 1917); M. D. Hull, "The Non-Partisan Ballot in Municipal Elections," *ibid.*, VI, 219-223 (Mar., 1917); M. R. Maltbie, "Municipal Political Parties," *Nat. Mun. League Proceedings*, VI, 226-238 (1900); W. B. Munro, *Government of American Cities* (3rd ed.), Chap. XIV, and *Municipal Government and Administration*, I, Chap. xv; M. Storey, *Problems of To-day* (Boston, 1920), Chap. I; O. G. Jones, "National Politics in Municipal Elections," *Nat. Mun. Rev.*, XVIII, 609-613 (Oct., 1929).

<sup>2</sup> Since 1913, the members of the Minnesota legislature have been elected on non-partisan tickets. In 1923, the North Dakota legislature enacted a bill for non-partisan election of members of the legislature, and also the chief executive officers of the state, but this was vetoed by popular referendum in 1924. County officials in North Dakota have been chosen in non-partisan elections since 1919. In California, all county and city officials have also been elected on non-partisan lines since 1910. In other states, the principal officials in cities having commission or commission-manager government are, in most instances, chosen similarly, although an exception may be noted in the third-

Wherever the non-partisan ballot has been adopted, it has been generally assumed by its advocates that the influence of national party organizations will be entirely eliminated from elections on the new basis, or at any rate reduced to a minimum. In many instances this has turned out to be the result, especially in relatively small communities. But in states or large cities having highly organized national party machines operating the year round, the outcome has been, and is quite likely to be, entirely different. In such places, removal of party designations from the ballot does not ensure genuine non-partisan elections, and sometimes it facilitates secret and irresponsible combinations to an even greater degree than in frankly partisan elections. Each political organization is almost certain to have its favorites upon the non-partisan ballot, in which case word is passed around—sometimes publicly, at other times in whispers—that such and such men are the “organization” candidates, and they receive partisan support to almost the same extent as candidates who publicly bear the party label.<sup>1</sup> Too great hopes of regenerating state and municipal politics must not, therefore, be staked upon the mere removal of national party labels from the ballot. It should also be remembered that while the Democratic or Republican label may not signify much in state or local elections, these labels do give the ordinary voter some idea of the forces or organizations behind a candidate; whereas, with a non-partisan ballot he may be left quite in the dark. Obviously, a poor clue under such circumstances is of greater assistance to intelligent voting than none.

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Spurious  
“non-par-  
tisan”  
elections

Having thus seen something of the nature of the political organizations that are instrumental in placing most of our state and local officials in office, we may turn attention to (1) the methods by which candidates are brought forward, or nominated; class commission-governed cities of Pennsylvania. North Dakota and California also have non-partisan election of judges. Iowa and Pennsylvania tried this, but after a few years restored partisan judicial elections. In 1915, the voters of California rejected a proposed constitutional amendment providing for the non-partisan election of all elective state officers. Governor Hiram Johnson's message to the legislature recommending this measure is summarized in *Amer. Polit. Sci. Rev.*, IX, 313-315 (May, 1915). In November, 1924, a similar proposal was rejected in Nebraska by a vote of 228,485 to 163,832; see *Nat. Mun. Rev.*, XIV, 59-60 (Jan., 1925). Cf. R. E. Cushman, “Non-Partisan Nominations and Elections,” *Annals Amer. Acad. Polit. and Soc. Sci.*, CVI, 85-96 (Mar., 1923); J. T. Salter, *The Non-Partisan Ballot in Certain Pennsylvania Cities* (Philadelphia, 1928).

Important  
aspects of  
the state  
party  
system:

<sup>1</sup> This regularly happened in the “non-partisan” election of judges in Pennsylvania in 1913-1921. See V. Rosewater, “Omaha's Experience with Commission Government,” *Nat. Mun. Rev.*, X, 281-286 (May, 1921); D. Stoffer, “Parties in Non-Partisan Boston,” *ibid.*, XII, 83-89 (Feb., 1923).

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(2) the series of committees which constitute the state party machinery; (3) the activities carried on by these committees; (4) the sources whence comes the money necessary to sustain these activities, and the laws which have been enacted to regulate the use of money in political campaigns; (5) the conduct of elections; (6) the qualifications and prerequisites for participation in elections; and (7) methods of enforcing a due sense of responsibility to the electorate on the part of public officials.

1. Nominating  
methods

The earliest systematic methods of nominating candidates for the principal state executive offices, and for representatives in Congress, took the form of legislative caucuses. In days when means of travel and communication were greatly restricted, it was extremely difficult to bring together party representatives from all sections of the state for the sole purpose of nominating candidates for public office. The sessions of the legislature, however, assembled a considerable number of political leaders from all parts of the state; and by the opening of the nineteenth century it had become customary for each party delegation in the legislature to meet in a caucus for the purpose of deciding upon a list of candidates to be "recommended" to the voters for their support at an approaching election. Often, however, a party did not have representatives in the legislature from certain parts of the state; and in order that such districts might have a voice, the practice developed of inviting to the caucus persons who could express the sentiment of the voters in the otherwise unrepresented districts. To the caucus as thus reënforced was given the name "mixed" legislative caucus.

The con-  
vention  
system

But before this system became established firmly, candidates for local offices in townships and cities were often nominated by more or less informal, and sometimes secret, meetings of party leaders, which were also called caucuses. Frequently, these groups appointed some of their number to confer with representatives of other similar caucuses with respect to the nomination of candidates for county offices or for offices of larger districts; and this custom soon developed into a systematic selection of delegates in local caucuses, according to some fixed plan of representation, to attend a formal county nominating convention.<sup>1</sup> In time, state nominating conventions, closely modeled upon the county conventions, sup-

<sup>1</sup> G. D. Luetscher, *Early Political Machinery in the United States* (Philadelphia, 1903), Chaps. III-IV; J. S. Walton, "Nominating Conventions in Pennsylvania," *Amer. Hist. Rev.*, II, 262-278 (Jan., 1897).



planted the legislative caucuses in the nomination of state and congressional candidates. By 1830, and for upwards of eighty years thereafter, the convention system was the practically universal device employed for the selection of party candidates for all offices above those of the township or other subordinate political subdivision of the state.<sup>1</sup>

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At its advent, the convention system was hailed as a marked improvement upon earlier nominating methods, as indeed it was. It was almost universally approved because it applied to the selection of party candidates the principle of representation that had long been employed in state and local governments. Theoretically, the voice of each voter could be transmitted from delegate to delegate until it found expression in the party's duly chosen nominees for the legislature and for the executive and judicial offices. And to this day, party leaders, as a rule, look upon the convention system as the ideal mode of selecting candidates. In their eyes, it furnishes an unexcelled opportunity for perfecting their party organization, for estimating the party's strength in various portions of the state or district concerned, for judging of the popularity of rival aspirants for nomination, for arousing party enthusiasm, for conciliating factions by agreeing upon "balanced" or compromise tickets, and for formulating party platforms.

Arguments  
for the  
system

However admirable in theory, the convention system in practice was soon found to afford little or no protection against boss or machine control of nominations. In many states, men who represented the best type of citizenship were seldom chosen as delegates; and when chosen, they often turned their credentials over to "proxies" named by party or factional leaders. Conventions became the "market-places of politics," where political "trades" were consummated, by the purchase, sale, or transfer of delegates from one candidate to another; convention proceedings were often marred by serious disorder and fraudulent practices; and in the larger states the system became so complicated that ordinary voters were unable to exert any appreciable influence upon the selection of the candidates put forward by their party. Chiefly for these reasons, a few states—notably New York and Indiana—have restricted the operations of the convention system to the nomina-

The  
system's  
decline

<sup>1</sup> For a fuller discussion of the rise and defects of the convention system, see M. Ostrogorski, *Democracy and the Party System* (New York, 1910), Chaps. II-V, VII; E. C. Meyer, *Nominating Systems* (New York, 1902), Pt. I, Chap. V; F. W. Dallinger, *Nominations for Elective Offices in the United States* (New York, 1897).

tion of candidates for the principal state offices. Since about 1903, however, the great majority of states have abolished the system outright, not only for congressional and state officers, but also for county and municipal positions.<sup>1</sup> In its place, the direct primary election system has been adopted, in one form or another, in all but three states.<sup>2</sup>

Under the direct primary method, candidates are nominated directly by the voters of each party, instead of indirectly through representatives called delegates. The primaries of the different parties are usually held on the same day, and at the places where the regular elections are held later on; they are presided over by the regular election officials, and are surrounded by practically all the formalities and safeguards attending a regular election; hence, the appropriateness of the full name for this system, *direct primary election*.<sup>3</sup> The ballots are generally printed at public expense, and are usually of uniform size and shape. In some states, the ballots of all parties are printed on paper of the same color, while in others, *e.g.*, New York, paper of a different color for each party is used. Aspirants for a party nomination to any office, as a rule, get their names printed on the primary ballot by filing petitions signed by a specified number of qualified voters, the number being roughly proportioned to the importance of the office sought, and varying all the way from one-half of one per cent of the qualified voters up to ten per cent.<sup>4</sup> Usually a candidate who receives the

<sup>1</sup> In fifty or more cities, candidates for municipal offices are nominated by the simple method of filing a petition signed by a specified number of qualified voters. This system is found in San Francisco, Cleveland, Boston, Pittsburgh, and a number of New Jersey cities.

<sup>2</sup> Connecticut, Rhode Island, and New Mexico. In April, 1925, the legislature of Colorado voted to repeal the direct primary law, but the measure was vetoed.

<sup>3</sup> A digest of state primary laws will be found in *Annals Amer. Acad. Polit. and Soc. Sci.*, CVI (Mar., 1923); C. E. Merriam and L. Overacker, *Primary Elections* (1928), 359-404; L. Overacker, "Direct Primary Legislation in 1928-1929," *Amer. Polit. Sci. Rev.*, XXIV, 370-380 (May, 1930). See also O. C. Hormell, *Cost of Primaries and Elections in Maine* (Brunswick, 1926); *Congressional Digest*, V, 255-286 (Oct., 1926), series of articles on "Is the Direct Primary System Sound?"; L. Overacker, "Direct Primary vs. Convention System," *Amer. Federationist*, XXXIV, 541-545 (May, 1927); A. J. Beveridge, "Of, By, and For the People—Yes or No?," *Sat. Eve. Post*, CXCIX, Dec. 11, 1926, pp. 8 ff.; Dec. 18, 1926, pp. 14 ff.; "The Direct Primary—Success or Failure?," *Transactions Common. Club of Cal.*, XIX, 553-664 (Dec., 1924); and P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed.), Chap. VI and pp. 545-551.

<sup>4</sup> California, in 1927, simplified the primary system by substituting for petitions signed by a large number of voters declarations of candidacy signed by "sponsors," the number ranging from ten to twenty for the lowest offices up to from sixty to one hundred in the case of the highest offices.

highest number of votes for a given office is declared to be the party nominee for that office, although where there are three or more aspirants for the same office, this may result in nomination by less than a majority. Eight southern states require a majority vote to nominate;<sup>1</sup> if no candidate obtains a majority in the primary, a second, or "run-off," primary is held, in which only the two highest candidates are voted for.<sup>2</sup>

The right to participate in making party nominations is commonly restricted by law to persons who are able to comply with some kind of a test of party allegiance. Such primaries are called "closed" primaries, to distinguish them from the "open" primaries found in Wisconsin and Montana, where no attempt is made to prevent Democrats from taking a hand in Republican nominations, and vice versa. A number of other states, however, in reality have the open primary, because the tests which they lay down are quite ineffectual in preventing voters from shifting temporarily from one party to another. The most effective means of preventing this practice, called "raiding," are to be found in those states which, like New York, require the formal registration or enrollment of the members of each party previous to the day of a primary. At the time of enrollment, various tests are applied to determine the right of voters to register as Republicans or as Democrats, as the case may be; and at the ensuing primary no one is allowed to vote whose name does not appear upon the respective party voting lists.

"Open"  
and  
"closed"  
primaries

From what has just been said, it will be seen that the direct primary usually presupposes the existence and activity of national party organizations in state and local nominations. Where, however, non-partisan elections have been adopted, they are usually preceded by a "non-partisan" primary conducted in practically all respects like an ordinary party primary, except that the ballots carry no indication of the party affiliations of the candidates; and no attempt is made to inquire into the party preferences of those

"Non-partisan"  
primaries

<sup>1</sup> North Carolina, South Carolina, Georgia, Florida, Louisiana, Mississippi, Texas, and Oklahoma.

<sup>2</sup> In Tennessee also, a run-off primary is authorized in the case of a tie vote. In order to approximate majority nominations, a number of states have tried the preferential system of voting, under which each voter is given an opportunity to express his first, second, and sometimes his third, choice among the candidates. This system is now used in connection with primaries only in Alabama. In Iowa and South Dakota, if none of the candidates for a given office receives thirty-five per cent of the total party vote in the primary, the selection of a candidate for that office is left to the action of a delegate convention.

who wish to participate in naming the "non-partisan" candidates. Non-partisan primaries may even be held at the same time and place, in which case separate ballots are prepared for the two kinds of nominations. In any event, the two candidates on the non-partisan ticket polling the highest number of votes for each office have their names printed upon the official ballot used at the ensuing election, where party designations are again entirely absent. In most places, the non-partisan primary thus becomes "a sort of qualifying heat which eliminates the weaker contestants from the final race," and ensures election by a majority, rather than a mere plurality, of the vote polled.<sup>1</sup>

The direct primary method for the selection of party candidates unquestionably gives the rank and file of the party a much more direct and decisive influence in determining nominations than was possible when candidates were picked by delegate conventions. Beyond this point, the supporters and opponents of the direct primary hold widely varying, even conflicting, views concerning its superiority over the convention system. The former argue that it brings to the polls on primary day a much larger proportion of the voters than took the trouble to come out merely to vote for delegates under the old system; that it has materially weakened machine control of nominations; that it affords at least an opportunity to bring forward better candidates, at all events a better chance to defeat conspicuously unfit ones; and that corruption, which often was a decisive factor in determining the selection of candidates by a convention, is robbed of most of its potency. Opponents of the direct primary, on the other hand, are in the habit of denying outright most of these claims, and of asserting that the direct primary has produced no better officials, favors wealthy aspirants for nomination, leads to increased taxation, involves greater expense to candidates generally, weakens the party organizations, destroys or impairs party responsibility, intensifies machine control, multiplies the number of candidates, and favors populous centers at the expense of rural sections of the state.

Most of the issues thus raised are merely matters of opinion, and therefore cannot be disposed of dogmatically and finally. With widely diverse laws, results under the direct primary have

<sup>1</sup> In the Chicago non-partisan aldermanic primaries, a candidate who receives a clear majority of the votes cast in his ward is declared elected. In California, under a constitutional amendment adopted in 1926, candidates for judicial, school, county, township, or other non-partisan offices receiving a majority of all the ballots cast for such office in a primary are declared elected.

naturally varied from state to state, and even from time to time and place to place within the same state. The only proper method, therefore, by which to appraise the system is that of comparing results under it, state by state, with conditions which prevailed in the same states under the convention system. Whatever the conclusions arrived at after such a comparison, the old convention system is so thoroughly discredited that the friends of the direct primary, while conceding its imperfections, are fully justified in their unalterable opposition to the restoration of the *unreformed* convention system. They cannot fairly be asked to discard the new method and return to the old until workable devices and effective safeguards are provided against the recurrence of the notorious evils connected with the convention system. That the direct primary is not all that it should be, or might become, will readily be conceded. But it should be pointed out that perhaps its chief shortcomings lie in the fact that direct primary laws fail to take into account the fact that democracy needs leadership, and neglect to provide for a leadership that is at once public, official, and responsible. Until guidance of this sort supplants the more or less secret, unofficial, and irresponsible leadership that has sprung up in most of our states and large cities, and until the number of offices for which popular nominations have to be made is greatly reduced, the best results logically to be expected from the direct primary will never be attained.

The frequent allusion to primary laws in the preceding paragraphs deserves a word of emphasis; for the appearance of statutes regulating nominating procedure is a fact which in itself reflects a marked change in the public attitude toward parties in general, and especially toward the methods by which they select their candidates for office. Until comparatively recent years, party nominations were looked upon as matters in which the public had no legitimate concern, and consequently the convention system grew to maturity almost wholly unregulated by law. Parties were regarded as private organizations, and the way in which they chose their candidates was considered a private affair with which the legislature had no right to meddle.<sup>1</sup> Now, however, the nomination of candidates is rightly regarded as quite as important a public function as their actual election to office, and therefore as falling within the field of legitimate state regulation. And this is especially true in "one-party" states, where a nomination at

New view  
of legal  
status of  
parties

<sup>1</sup> C. E. Merriam, *American Political Ideas, 1865-1917*, pp. 278-288.

the hands of the dominant party is usually equivalent to election.<sup>1</sup> Political parties are looked upon no longer as private organizations, but as public institutions whose activities in other respects than nominations may also be controlled by law; so that now one finds in most states laws which regulate almost every phase of party activity, including the structure and functions of what is commonly called party machinery and the raising and expenditure of money in connection with political campaigns. Both of these matters call for some comment at this point.

2. Party  
machinery

The machinery of the two leading national parties consists of a complicated network of committees extending over the entire country and ramifying into every community. Such of these committees as make it their main business to promote the nomination and election of officers of the national government have been described in an earlier chapter.<sup>2</sup> They, however, depend very largely for their success upon the efficiency of the much greater number of committees which make up the more continuously active state party organization.

State  
central  
committee

In every state, the two major parties, and in some states minor parties as well, maintain a central committee which serves as the head of the state party organization.<sup>3</sup> In size, composition, and powers, these central committees vary greatly, as also do the subordinate committees about to be mentioned. Such matters are now regulated by law in most states;<sup>4</sup> but in the absence of law, party rules govern. Members of the state central committee represent the various counties, or legislative or congressional districts, of the state, and are either elected directly by the party voters or chosen by delegate conventions. The committee usually elects its own officers, including a chairman (who may or may not be the real head of the state organization), a secretary, a treasurer, an executive committee, and any other committees that may be needed. When the convention system held undisputed sway, the state central committee, or an inner group, often exerted decisive influence upon the action of the state convention in selecting candidates; but in states that have adopted the direct primary, the committee's influence upon nominations has declined, or at all events has be-

<sup>1</sup> *E.g.*, Pennsylvania, Vermont, California, and the southern states.

<sup>2</sup> See Chap. XIII above.

<sup>3</sup> C. E. Merriam, "State Central Committees," *Polit. Sci. Quar.*, XIX, 224-233 (June, 1904).

<sup>4</sup> A tabulation of these laws is given in *Annals Amer. Acad. Polit. and Soc. Sci.*, CVI, 222-232 (Mar., 1923).

come much less conspicuous and decisive. Nowadays, the committee's energies are concentrated upon the election of the national and state party tickets and the maintenance of an efficient party organization throughout the state between elections. Occasionally, too, the committee is empowered to formulate the state party platform.

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Subordinate to the state central committee, and operating in a more restricted sphere, are similarly constituted committees in nearly every congressional, legislative, or senatorial district of the state. Sometimes these committees are made up almost wholly of *ex-officio* members, such as the chairmen of the county committees within the district. Of more importance, however, are the county central committees, found in practically every county, and the city central committees, found in almost all cities, and especially influential in the largest municipalities. Almost every city ward and voting precinct also has its dual or triple set of party committees; and the same is true of nearly every village and township. Members of the county central committee and of the other local committees are usually elected directly by the party voters in the subdivision concerned. Originally, all of these committees consisted exclusively of male voters; but with the adoption of woman suffrage, many committees have expanded their membership so as to admit women voters; while in other instances the hierarchy of men's committees is rapidly being paralleled with a series of women's committees.<sup>1</sup>

Subordi-  
nate com-  
mittees

It should, of course, be made clear that the party machinery here described is fundamentally a different thing from the political "machines" of which we often hear. The real party machinery or organization is the foregoing series of committees, ramifying throughout the state. Every state, county, and other local subdivision has its party machinery in this sense; happily, some states and many counties and smaller communities are without any political "machine." In the larger cities, on the other hand, the series of committees is sometimes identical with, or at least controlled by, a local "machine," in which case it is not inaccurate to use the terms machine and party organization interchangeably. Thus, the Tammany machine is the Democratic organization in New York county, and the Republican machine in Philadelphia is

Party ma-  
chinery and  
political  
"machines"

<sup>1</sup> See *Sat. Eve. Post*, CXCVIII, July 18, 1925, pp. 6 ff., "Are Women Counting in Politics?"; W. S. Dobyne, "The Woman Voter and the Political Machine," *Woman Citizen*, XI, 20 (Jan., 1927).

the Republican organization of that city. Sometimes the party organization for an entire state becomes a "state machine." Thus there has been a "Hill machine" controlling the Democratic state organization in New York, and a "Quay machine" and a "Penrose machine" similarly dominant in the Republican state organization of Pennsylvania. Usually, however, the term "machine" applies to some smaller area and some lesser group of politicians, so that it is possible to find several "machines" within the same party in a single state. On the other hand, there is ordinarily only one Democratic or Republican organization for a state. Furthermore, the motives of persons in control of a machine are apt to differ from those animating the leaders of the real party organization; the latter, as a rule, seek primarily to promote the interests and success of the party as a whole, whereas the members of a machine often subordinate party interests to their own personal advantage, and are even ready secretly to sacrifice the party if thereby some important benefit may be secured for the machine.<sup>1</sup>

The activities of the committees which constitute the party organization or machinery sometimes begin long in advance of the primaries or conventions in which candidates are nominated, with a view to bringing about the nomination of an "organization slate," or ticket of candidates favored by those in control of a given committee or series of committees. The greater part of the committee's work, however, relates, directly or indirectly, to the conduct of the "campaign" which begins shortly after nominations are made. In presidential campaigns, all of these committees coöperate closely with their respective national party organizations. Their efforts are directed toward arousing interest in, and enthusiasm for, the party ticket among the rank and file of party members; they call meetings of local party workers; they direct "rallies" and "demonstrations;" they attend to the enrollment of new voters and the naturalization of aliens; they instruct voters about registration formalities, the location of polling places, and the form of the ballot; they endeavor to bring home to the voters the claims of the party and of individual candidates;<sup>2</sup> they are expected to raise money for use in their respective districts, to employ speakers

<sup>1</sup> P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed.), Chap. xvi. Cf. L. W. Lancaster, "The Background of a State 'Boss' System," *Amer. Jour. Soc.*, XXX, 783-798 (Mar., 1930).

<sup>2</sup> A few states have laws which require the printing and mailing to every voter before primaries and elections of "publicity pamphlets" in which are to be found statements by the various party committees or candidates bearing upon their respective claims to favorable consideration.



whenever possible, and to distribute campaign literature furnished by the national organization; they appoint party watchers to serve at the polls on election day, and often virtually appoint the other election officials; they assist in conducting canvasses of voters before important elections; they take great pains to get out the full party vote and to ensure a fair count of the ballots cast.

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The maintenance of party headquarters during campaigns (and often, in the larger communities, throughout the year), the employment of organizers and other workers to make canvasses and assist in getting voters to the polls, expenses connected with the holding of political meetings, the compensation of speakers, and the publication and distribution of campaign literature entail the raising and spending of large sums of money in every warmly contested election, the amounts required increasing, of course, with the number of voters to be reached. The greatly augmented sums spent in political campaigning in recent years have resulted in a large output of laws relating to party finance, most of them designed to restrict in various ways the use of money in connection with primaries and elections. These laws, together with others that have long been on the statute-book, are commonly referred to collectively as corrupt practices acts.<sup>1</sup> Although they cover a wide range of subjects, they fall roughly into four main classes. (1) Corrupt practices acts, using the term in a restricted sense, are found in all states, and their purpose is to prevent or punish infractions of the election laws, especially bribery and treating, intimidation of voters, personating voters, stuffing ballot-boxes, and a number of other practices not directly involving the use of money. (2) Other laws seek to restrict the sources of party campaign funds by prohibiting contributions from corporations, by forbidding the assessment of office-holders and public employees, and by limiting the amounts that may be solicited from candidates. (3) Still other very numerous laws place restrictions upon the amounts which candidates and party organizations may spend in quest of votes. Some of these laws forbid the expenditure of more than a certain fixed sum, varying with the importance of the office, or more than a certain percentage of the salary attached to the office. Others limit the aggregate expenditures by political committees to a stated amount for each vote cast at the last preceding general election. In still

4. Party  
finance

Regulatory  
legislation

<sup>1</sup> On the federal corrupt practices laws, see pp. 222-223 above. Cf. H. M. Rocca, *Corrupt Practices Legislation* (Washington, 1928); E. R. Sikes, *State and Federal Corrupt Practices Legislation* (Durham, N. C., 1928).

other instances, unlimited expenditures are permitted for certain definitely enumerated purposes, expenditures for any other purposes being, by implication at least, prohibited. (4) Lastly, there are both national and state laws which require the publication, either before or after a primary or an election, of the names of contributors and the amounts contributed by each person to any party campaign fund; and also requiring the filing of a detailed statement, under oath, of the amounts expended by candidates or committees, and the object of such expenditures. On the whole, these various laws have not proved very effective in reducing the amounts expended in legitimate ways; nor have they entirely eliminated illegitimate expenditures.<sup>1</sup> These and other problems connected with party finance are, therefore, still far from a final or satisfactory solution.

5. Elec-  
tionsThe  
electorate

In discussing nominating processes, party committees, and party finance, frequent mention has been made of the voters, or the electorate. Who are the voters? Who constitute the electorate, to influence whom such elaborate and costly organization and methods seem necessary? Up to a point, every state answers this question for itself; and usually the answer may be found in an article in the state constitution dealing with the suffrage. If a state is disposed to be generous, even to the point of prodigality, in conferring indiscriminately the privilege of voting upon men, women, and children, there is nothing in the national constitution or laws to prevent. If, on the other hand, a state desires to confer the voting privilege more narrowly, care must be taken that no citizens of the United States are discriminated against on account of race, color, or previous condition of servitude, or on account of sex; for discriminations on any of these grounds are definitely forbidden in the national constitution.<sup>2</sup> In all other respects, however, the states are given a perfectly free hand in laying down their suffrage requirements.<sup>3</sup>

The history of suffrage regulations has been so fully outlined in an earlier chapter<sup>4</sup> that it is sufficient to observe here that all states now have systems falling not far short of universal suffrage for citizens of the United States who are at least twenty-one years of age and have resided within a given state for one year,

<sup>1</sup> For a fuller discussion of corrupt practices acts, see P. O. Ray, *An Introduction to Political Parties and Practical Politics* (3rd ed.), Chap. XI.

<sup>2</sup> Amendments XV and XIX.

<sup>3</sup> K. H. Porter, *A History of Suffrage in the United States* (Chicago, 1919).

<sup>4</sup> Chap. XI above.

or some other stipulated period, and within their home county and election precinct for a somewhat shorter length of time. Formerly, the common requirement that, in order to vote, an elector must appear in person at his proper polling place in his home precinct on primary or election days in effect disfranchised thousands of voters who were detained from the polls by illness or accident, or whose business required them to be away from home at the time when an election was being held. The rapid spread of absent-voting laws since 1911, however, has done much to remedy this injustice by making it possible for certain classes of absentees to cast their ballots *in absentia* or before leaving home. All but two of the states now have such laws.<sup>1</sup>

Every state prescribes by law the way in which citizens who possess the voting qualifications may have their names placed upon the official voting-list used in primaries and elections; and persons who are not thus "registered" are not permitted to vote unless they comply with certain additional formalities set forth in the law. The preparation of voting-lists is commonly managed by some county official or by the county board, although in large cities, in many counties, and in a few states, there are special city, county, or state election boards that attend to such matters and perform other election duties. Most states have a partial or complete system of personal registration, so-called from the fact that each voter must appear in person before the registration officials and prove his right to vote. In some states, such personal registration may be made once for all; having once established his right to vote, the voter knows that his name will remain on the voting list until his death, removal from the district, or disqualification for some other cause. In point of fact, it is not always removed even under these circumstances. In most cities, however, periodical registration is required, annually or biennially.<sup>2</sup> Under either system, the work

Registration  
of  
voters

<sup>1</sup> These are Connecticut and Kentucky. An absent-voting law was passed in Kentucky in 1918, but was held by the state supreme court to be unconstitutional. *Clark v. Nash*, *Lyon v. Nash*, 192 Ky. 594 (1921). Pennsylvania's constitution provides for military absent-voting; but a law of 1923, extending the privilege to civilians, was declared unconstitutional by the state supreme court in 1925. For summaries of absent-voting legislation, see *Amer. Polit. Sci. Rev.*, VIII, 442-445 (Aug., 1914); X, 114-115 (Feb., 1916); XI, 116-117 (Feb., 1917); XI, 320-322 (May, 1917); XII, 251-261 (May, 1918); XII, 461-469 (Aug., 1918); XIII, 269-270 (May, 1919); XVI, 463 (Aug., 1922); XVIII, 321-325 (May, 1924); XX, 347-349 (May, 1926). See J. K. Pollock, Jr., "Absent-Voting, with Particular Reference to Ohio's Experience," *Nat. Mun. Rev.*, XV, 282-292 (May, 1926).

<sup>2</sup> The principal work on this general subject is J. P. Harris, *Registration of Voters in the United States* (Washington, 1929). On the "permanent"

of registration is performed, as a rule, at the precinct polling places used on primary and election days; and it is almost always entrusted to the regular bi-partisan polling officials of the precinct, who in this way are supposed to become more familiar with the qualifications of the voters who will appear before them at the ensuing primary or election.

It is essential to a proper and efficient enforcement of registration and election laws that the officials charged with their administration be not only honest but intelligent and thoroughly familiar with the technical requirements of the law. Few states, however, have taken steps to ensure that this work shall be entrusted only to competent men of high repute. In some of the southern states, the unscrupulous exercise of large discretionary powers by election registrars in applying educational and other tests to negro applicants for registration has resulted in disfranchising thousands of eligible negroes and in deterring other thousands from even applying for registration.<sup>1</sup> A thoroughgoing personal registration law should provide in detail, especially in cities, for a system of revising and purging registration lists prior to each primary or election. The need of this was brought out strikingly some years ago in Philadelphia, and afterwards in Terre Haute, Indiana, where, in connection with the trial of the mayor and more than a hundred

registration system in Minneapolis, see *Nat. Mun. Rev.*, XIII, 488-492 (Sept., 1924); in Milwaukee, *ibid.*, XIV, 603-609 (Oct., 1925); in Boston, *ibid.*, XV, 537-541 (Sept., 1926); in Omaha, *ibid.*, XV, 637-644 (Nov., 1926). Other useful articles on registration of voters are F. H. Riter, "Permanent Registration for Elections Unsuitable for Large Cities," *ibid.*, XIV, 532-535 (Sept., 1925); J. P. Harris, "Registration for Voting in San Francisco," *ibid.*, XV, 212-218 (Apr., 1926); "A Model Registration System," *ibid.*, XVI, Supp., 45-86 (Jan., 1927); Chicago Bureau of Public Efficiency, *A Proposed System of Registering Voters and Canvassing the Registration Lists in Chicago* (pamphlet, 1923); "Permanent Registration," *Transactions Common. Club of Cal.*, XXIV, 245-267 (Sept., 1929). Recent legislation on the subject is summarized in *Amer. Polit. Sci. Rev.*, XXII, 349-353 (May, 1928); XXIII, 908-914 (Nov., 1929); XXIV, 963-966 (Nov., 1930).

<sup>1</sup> T. J. Jones, "Power of the Southern Election Registrar," *Outlook*, LXXXVII, 529-531 (Nov. 9, 1907). Some idea of the extent of negro disfranchisement may be obtained from the following facts: Louisiana, Mississippi, and Kansas have approximately the same population and representation in Congress; but in 1924 only 121,951 votes were cast in Louisiana and 112,463 in Mississippi, while in Kansas 662,451 votes were cast. In Mississippi, more than half, and in Louisiana nearly half, of the population is colored. Similarly, South Carolina and Arkansas have about the same population; but only 50,751 votes were cast in the former, and 138,532 in the latter, while in Connecticut, a somewhat smaller state, 401,033 votes were cast. The discrepancies are to be accounted for in some measure by the fact that Democrats, being assured of an easy victory, do not go to the polls in the southern states in the same proportion as in states where there is a real contest. But the main explanation is the virtual disfranchisement of the negroes. See pp. 190-193 above.

other local politicians, "one witness testified to the frequent registration of non-residents and of dead men, and in one case even of a pet dog. On election day these fraudulent registrations were voted on by hired repeaters and thugs."<sup>1</sup>

CHAP.  
XXXVIII

Probably no kind of literary matter is more unattractive to the ordinary citizen than the laws which govern the conduct of elections. Invariably phrased with the traditional legal verbiage and circumlocutions, they make extremely slow and difficult reading. Moreover, they include a maddening maze of minute regulations applying to every stage of the nominating and election process—matters of which the elector is only dimly conscious, if conscious at all, when he votes once or twice a year. The election laws of most states, therefore, make up rather sizeable volumes, which few citizens ever have the courage to study. Nevertheless, the character and provisions of these laws are matters of vital importance to citizens generally; for the ballot box is the only point at which most people can exercise any control over their government. However virtuous, public-spirited, conscientious, and well-intentioned a citizen may be when he goes to the polls, these good qualities or intentions may be rendered of no effect by poorly drawn and inadequate election laws, or by dishonest or incompetent officers, or by a long and confusing ballot. Such things, therefore, as the form of the ballot, the choice, qualifications, and duties of election officers—in fact, the provisions of election laws generally—are not to be passed over as the "mere mechanics" of popular government. They are, rather, matters which pertain to the very essence of such government.

Election  
laws

Some of the main points covered by our election laws can best be summarized in connection with the work of the various election officers. Construed broadly, the term "election officers" covers three classes of officials: (1) those in charge of the preparations for an election; (2) those in charge of polling places during an election; and (3) canvassing and returning officials.

Election  
officers

The first class includes (a) the persons who are in charge of the registration or enrollment of voters prior to primaries or elec-

<sup>1</sup> S. C. Stimson, "The Terre Haute Election Trial," *Nat. Mun. Rev.*, V, 38-46 (Jan., 1916). Over four and a half million errors or omissions in the registration and poll books of the cities of New York State were discovered in 1914 through the vigilance of the state superintendent of elections and his deputies. On fraudulent registration and repeating in New York City, see E. R. Finch, "The Fight for a Clean Ballot," *Independent*, LXVIII, 1020-1026 (May 12, 1910). Cf. M. C. Krueger, "Election Frauds in Philadelphia," *Nat. Mun. Rev.*, XVIII, 294-299 (May, 1929).

tions, and (b) those who designate the polling places, mark out election districts, appoint polling officers, prepare sample and official ballots, advertise the time and place of elections, and provide the necessary equipment for polling places. It is very common to put these preliminaries, except the registration of voters, in the hands of county officials, such as boards of supervisors or county commissioners, or of special election boards, as in New York, Chicago,<sup>1</sup> and other large cities. Few people realize the magnitude of the preparations which precede an election in a large city, or even in a populous county. In New York, over three thousand, and in Chicago over two thousand, polling places have to be arranged for; the boundaries of an equal number of voting precincts have to be marked out; from twelve to fifteen thousand polling officials have to be selected and appointed; arrangements have to be made for storing, hauling, setting up, and removing thousands of voting booths, curtains, guard-rails, and ballot-boxes; all of the materials and supplies used at polling places—pens, ink, pencils, sealing-wax, candles, envelopes, poll-books, tally-sheets—have to be purchased and distributed; thousands of cards of instructions to voters and circulars of instruction to polling officers, and hundreds of thousands of sample and official ballots, have to be printed and sent to the proper places. Considering the haphazard way in which most election officials are chosen, the wonder is that the gigantic task is performed as honestly and efficiently as it is.

Polling  
officers

The second class of election officers comprises those who are in charge of polling places on primary and election days. Their number, titles, terms, and methods of selection vary from state to state. In the great majority of cases, they are appointed on a bi-partisan basis, although in Pennsylvania they are elected by popular vote, a system which has proved very unsatisfactory. In New York, one finds in every election precinct four inspectors of election, two poll clerks, and two ballot clerks, divided equally between the two principal parties. In Illinois, there are three judges of election and two clerks in each polling place; and in Pennsylvania, one judge, two inspectors, and two clerks. In addition to these officials, party organizations or candidates regularly appoint a certain number of challengers or watchers, or both. Watchers are entitled to see everything that is done by the election officers at both the casting and the counting of the ballots. Chal-

<sup>1</sup> J. G. Kerwin, "Electoral Administration in Chicago," *Amer. Polit. Sci. Rev.*, XXI, 830-834 (Nov., 1927).

lengers, as the name suggests, are present to prevent illegal voting. Police officers, also, are found in or near the polling places to maintain order, subject to the direction of the officials in charge.

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The duties of polling officers are set forth in the election laws of the several states, and are essentially the same everywhere. These officers check and record the names of voters as they appear at the polls, and have custody of the ballot boxes and the ballots. In some states, they assist voters who are unable to mark their ballots unaided. They pass in the first instance upon challenges, and sometimes have special police powers. Aside from preparing small circulars of instructions and distributing them a few hours before an election, few states make provision for securing well-qualified polling officials. Appointments in many places are distributed by local politicians among their friends as political favors, and sometimes for sinister purposes, seldom with any regard to the technical requirements of the office. At one time, New Jersey required persons nominated for polling positions by the county chairmen of the leading parties to pass examinations conducted in each county by the state civil service commission.<sup>1</sup> A wider adoption of some system of examination would tend to secure a fairer administration of the election laws and more accurate recording and determination of election results.

Appoint-  
ment and  
duties

The third class of election officers includes canvassing and returning officials. When the polls close, the ballots are first counted, or canvassed, at the polling places by the officials in charge.<sup>2</sup> In some states, *e.g.*, New York, the counting is done publicly; in others, it is done only in the presence of the polling officers. Tally-sheets are provided to facilitate the count, and are preserved as a part of the official record of the election. Upon the completion of the count, all ballots, used and unused, including spoiled and defective ones, together with the poll-books and tally-sheets, are placed in sealed packages or in sealed ballot-boxes; and all are carefully preserved and guarded for a specified period, after which the ballots are destroyed. Between 1916 and 1923, San Francisco employed an interesting arrangement under which all ballot-boxes were conveyed, at the close of the polls, to the office of the registrar

Canvassing  
and return-  
ing officers

<sup>1</sup> This law, enacted in 1911, is no longer in force.

<sup>2</sup> See G. Mygatt, "Counting the City's Vote; How New York's Election Returns Come In," *Outlook*, CV, 535-541 (Nov. 8, 1913); A. M. Stoddart, "How the Newspapers Tell the Story of Election Day," *ibid.*, CXIV, 566-569 (Nov. 8, 1916); R. L. Duffus, "The Giant Task of Gathering the Returns," *N. Y. Times*, November 4, 1928.

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election  
boardsFinal  
stages  
of the  
count

of voters in the city hall; and there, under his supervision, they were publicly counted, precinct by precinct, by competent persons specially selected for the work.<sup>1</sup> About a dozen states, including Iowa, Kansas, Missouri, Nebraska, and West Virginia, have passed laws for the appointment of "double election boards;" one board, called the receiving board, attends to the delivery of ballots to the voters, checks voters' names, and has general charge of the polling place; the other, called the counting board, proceeds to the polling place at a designated hour after the polls have opened, begins counting the ballots already cast, and remains at the task after the polls close until the count has been completed.<sup>2</sup>

When the precinct results have been ascertained, "return blanks are made out in duplicate or triplicate, the proper election officer entering the exact number of votes received by each candidate and affixing his signature. One set is then sent off to the city or county clerk, or to the board of elections; another is transmitted to some higher canvassing body, *i.e.*, the county board of supervisors in California, the judges of the court of common pleas in Pennsylvania, the county clerk assisted by two justices of the peace of the county in Illinois, the board of election commissioners in most large cities. On a day fixed by law, these canvassing bodies in each county or city proceed to canvass the returns from the various precincts over which they have jurisdiction; that is to say, they add up the votes reported for each candidate from the different precincts. They then certify the result, so far as it concerns national and state offices, to some state official (usually the secretary of state), who is required to consolidate and transmit these returns to a state canvassing board. In New York, the state canvassing board (as reorganized in 1927) is a bi-partisan body consisting of the attorney-general acting as chairman, two senators chosen by the senate, and two members of the assembly chosen by that body. In Illinois, the board is made up of the governor, the secretary of state, the auditor, the treasurer, and the attorney-general. These state boards, in turn, add up and check over the results reported from the several counties. The last stage in the process is reached when the state and county canvassing boards file their

<sup>1</sup> In 1921, the right to adopt the central counting system was extended to all the cities and counties in California. With the adoption of voting machines, in 1923, the system of centralized counting in San Francisco became unnecessary and was discontinued.

<sup>2</sup> L. McCarthy, "Counting Votes Before the Polls are Closed," *Amer. Polit. Sci. Rev.*, XIX, 784-788 (Nov., 1925).



reports with the officials designated by law, usually the county clerk in the case of county offices and the secretary of state in the case of state and national offices; whereupon these officials issue to each person declared to be elected a certificate of election which in *prima facie* evidence of the legal right of the person named therein to hold the office and perform the duties connected with it.

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Such a certificate is not, however, conclusive; for all state election laws include detailed provisions for "contested elections," that is, for disputes arising when a defeated candidate alleges that he has been illegally denied a certificate of election. Such cases are commonly determined in the courts, although in some states, as Illinois, the legislature is the authority which decides conflicting claims to the highest state offices. Where such contests involve the right to a seat in the state legislature or in a city council, the legislative house or the council concerned almost invariably has the power of decision.

Certifi-  
cates of  
election

Secrecy in voting is now everywhere provided for, either in the state constitution or by statutes; and it has been effectually ensured by the almost universal adoption of some form of the so-called Australian ballot during the past thirty years.<sup>1</sup> Ballots are no longer left to be printed and circulated by candidates or party organizations, as before 1890, but are almost universally prepared by responsible public officials at public expense, and in accordance with standard forms prescribed by law. Names of the candidates of all parties usually appear on a single sheet, except those of presidential electors, which are sometimes printed on separate ballots. Separate ballots are commonly prepared also for city offices whenever a city election occurs on the same day as a state or national election.

The ballot

The arrangement of the names of candidates on the ballot varies in different states but usually conforms to one or the other of two plans. In the party-column type of ballot, found in the majority of states, candidates of the different parties have their

Principal  
types of  
ballots

<sup>1</sup> The Australian ballot is now used in all states except South Carolina. Georgia was the last state to adopt it (1922), but its use in any county there depends upon the favorable action of two successive grand juries. See E. C. Evans, *A History of the Australian Ballot System in the United States* (Chicago, 1917). The use of voting machines, instead of paper ballots, is authorized in a number of states, although the substitution is usually left optional with the locality concerned. See T. D. Zukerman, *The Voting Machine—Its History, Use, and Advantages* (pamphlet, New York, 1925); "The Case for Mechanical Voting," *Nat. Mun. Rev.*, XIV, 226-233 (Apr., 1925); and "The Voting Machine Extends Its Territory," *Amer. Polit. Sci. Rev.*, XXI, 603-610 (Aug., 1927).

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names printed in separate columns, at the head of which appears, in each case, the party name and a "party circle" or "party square." The voter has merely to place a single cross in this circle or square to ensure that his ballot will be counted for all the candidates of the given party. This obviously facilitates what is called "straight-ticket" voting, and accordingly the plan is regarded with high favor by party leaders. In Massachusetts, New York, and a number of other states, a different arrangement is employed. The names of candidates of all parties are grouped together under the titles of the offices for which they are running, the designation of the party to which each candidate belongs appearing alongside his name. There is no way of voting a straight party ticket with a single cross, as in the party-column type of ballot; on the contrary, to vote a straight-ticket, a voter must place a cross opposite the name of every candidate of a given party. For this reason, the Massachusetts type of ballot, as this form is called, is said to favor independent, or "split-ticket," voting. Pennsylvania ballots retain the grouping of candidates by offices, as in Massachusetts, but also provide in the left-hand margin a list of the parties represented on the ballot; and a single cross placed opposite one of these party names is counted as a vote for every candidate nominated by that party—a device which, of course, makes straight-ticket voting quite as easy as where the party-column ballot is employed. Montana and a few other states, although retaining the party column for the guidance of voters, omit the party square or circle at the head of the column, so that there is no possibility of voting a straight ticket merely by making a single cross.

Election  
system  
criticized

Few phases of our governmental system have been more severely criticized in recent years than our scheme of elections. The chief criticisms relate to the frequency of primaries and elections, the concurrence of local, state, and national elections, the large number of offices filled by popular election, and the almost universal rule of election by plurality vote. Each of these criticisms deserves at least brief consideration.

1. Fre-  
quency of  
elections

Concerning the frequency of elections, nothing more need be said than to call attention to the familiar fact that the election of president and vice-president and of certain important state officers occurs every four years; that some state officers are elected triennially, and others, along with congressmen and most county officers, biennially; that many county and local offices are filled

annually; and that practically all of these elections are preceded by primaries or nominating conventions. Not only do these frequently recurring primaries and elections impose a heavy financial burden upon the tax-payers, but they make it impossible for the average preoccupied citizen to keep up an intelligent interest and to take an active part in the nomination and election of the men who in various ways act for him in the conduct of public affairs.

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National, state, and local elections often fall on the same day, with the result that the names of candidates for offices of all three kinds, or at least for national and state offices, are printed on the same ballot. This frequently results in a serious confusion of national with state and local issues, to the detriment of state and local government. A remedy has been sought in many states by arranging elections so that the most important state and local contests will be held in years in which presidential and congressional elections do not occur. Some states have not stopped here, but have also separated purely local from state elections. The latter divorcement may, however, easily be carried so far as unreasonably to increase the number of elections occurring in a single year, as has been done in Illinois.

2. Concurrency of national, state, and local elections

Of far greater seriousness than either of the foregoing defects in our electoral system is the so-called long ballot, with which most voters are confronted when they go to the polls at presidential elections and at many state and local elections as well. The bewildering list of candidates to be voted on is accounted for partly by the number of offices now filled by popular election, partly by the coming together of national, state, and local elections, and partly by the fact that there are usually two or more candidates for every office to be filled. The result is that ballots bearing three hundred, and even more than four hundred, names are by no means uncommon. Certain serious consequences are entailed. For one thing, it is extremely difficult, if not impossible, for a majority, or even a considerable minority, of the voters to form an intelligent opinion of the merits of the candidates, especially when elections take place frequently. Consequently, there is a great amount of blind voting, especially in the form of straight-ticket voting. Another result is that the merits of the candidates for only a few principal offices are seriously considered, even by well-informed voters. Popular interest is usually concentrated upon candidates for president, governor, and mayor, to the almost complete neglect of the remainder of the ticket. At best, in other words, there is intelligent

3. The long ballot

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Need of  
shortening  
the ballot

Offices that  
should be  
appointive

voting for a few prominent offices, and blind voting for the great majority of minor offices. Taking advantage of popular preoccupation with the most conspicuous offices, politicians are often able to get wholly unfit candidates into minor, though not unimportant, positions.<sup>1</sup>

The remedy for much of this blind voting is to shorten the ballot by sharply reducing the number of elective positions. Officers who have a share in translating public opinion into law, or who enjoy large discretionary powers in the administration of laws—in other words, all policy-determining officials—should continue to be elective. But there are very few of these. The president, the members of both branches of Congress, the governor and members of the legislature, and the mayor and members of the city council are obviously policy-determining officers. To a less extent, this is true of boards of county commissioners or county supervisors. But here the list ends; very few other officials have anything to do with the formulation of public policy in the field of either legislation or administration. On the contrary, their respective official duties are set forth minutely in the national or state constitution or statutes, or in the city charter and ordinances; so that all that they have to do is to study the laws relating to their positions, do what the laws require of them, and do it in the manner prescribed in the law. In other words, their duties are purely ministerial, involving practically no opportunity for the exercise of discretion or independent judgment. In this category fall such officers as secretary of state,<sup>2</sup> state engineer and surveyor, state superintendent of public instruction, state treasurer and comptroller, county auditors or comptrollers, sheriffs, county clerks and court clerks, city clerks and city treasurers, and a host of others whose candidacies now encumber our ballots. Choosing them by popular election yields no advantage which is not more than offset by the evils traceable to the resulting lengthening of the ballot. Moreover, the inability of the average citizen to attend to the work of selecting candidates for so many offices has been largely

<sup>1</sup> R. S. Childs, *Short Ballot Principles* (New York, 1911); "The Short Ballot," *Outlook*, XCII, 635-639 (July 17, 1909); and "Ballot Reform; Need of Simplification," *Amer. Polit. Sci. Assoc. Proceedings*, VI, 65-71 (1909).

<sup>2</sup> The national government presents no difficulty at this point; hence only state and local offices need be spoken of. New York (1925) and Virginia (1928) have adopted constitutional amendments reducing the number of elective state offices by converting the offices of secretary of state, state treasurer, and state engineer and surveyor in New York, and the secretary of state, state treasurer, and superintendent of public instruction in Virginia, into appointive positions.

responsible for the rise of a class of professional politicians who make it their business to attend to precisely that sort of thing. Although it is customary to sneer at the political experts called professional politicians, they are nevertheless indispensable so long as we continue to identify multiplicity of elective offices with genuinely democratic government. But the fact is that many, if not most, of our elections now mean little more than the ratification of one or the other of two slates of candidates previously arranged by irresponsible and unofficial experts, operating more or less in secret.

The recent adoption of commission and manager government in several hundred cities has been accompanied by a noteworthy reduction in the number of elective municipal officers. In state and county governments, on the other hand, comparatively slight progress toward a shorter ballot has been made. This is due partly to the fact that constitutional amendments are necessary before many elective offices can be converted into appointive ones, and it is also to be explained by the unrelenting opposition of most professional politicians to changes which obviously would materially lessen their importance and power.<sup>1</sup>

The last of the several criticisms of our system of elections mentioned above is directed against the plurality rule in deciding elections. It is a principle of democratic government that elective offices shall be filled in accordance with the wishes of a majority of the voters.<sup>2</sup> Our well-nigh universal system of plurality elections often violates this principle; for, whenever there are three or more candidates for a single office, the successful candidate—that is, the one receiving the highest vote—is very likely to be elected by only a minority of the voters. In national, state, and county elections, practically nothing has been accomplished toward remedying this situation. In city elections, however, a solution has been found in the principle of preferential voting. Since 1909, more than fifty cities have done away with primary elections and have substituted nomination by petition, followed by the use of a preferential ballot on election day.<sup>3</sup> On this ballot, names of candidates are grouped

4. Plurality elections

Preferential ballot

<sup>1</sup> Some states have shortened the ballot in presidential elections by omitting the names of presidential electors. Names of presidential and vice-presidential candidates appear on the ballot, and the governor issues a certificate of election to the electors of the party which carries the state.

<sup>2</sup> C. A. Beard, "The Fiction of Majority Rule," *Atlantic Monthly*, CXL, 831-836 (Dec., 1927).

<sup>3</sup> Notably San Francisco, Spokane, Portland, Denver, and Columbus. In Cleveland also, the preferential ballot was used for some years previous to the substitution of proportional representation in 1922. In San Francisco, the

by offices, as in the Massachusetts type of ballot, but at the right of each candidate's name are three columns in which the voter may express his first, second, and third choices, although he is not permitted to express more than one choice for the same candidate, and is not required to indicate more than his first choice. If any candidate is found to have received a majority of the first-choice votes, he is at once declared elected. If no one has a majority, the result is usually determined by adding the second-choice votes to the first choices. If even then no candidate has a majority, to the first- and second-choice votes are added the third choices, and the candidate who now has the *highest* number is declared elected. In behalf of preferential voting, perhaps the most impressive claims advanced are that it comes nearer to election by absolute majority than most other systems; that, by giving each voter a much wider range of choice among candidates, it tends to emphasize issues rather than personalities, and thus to eliminate personal attacks and recriminations; and that it obviates the necessity of bringing the voters to the polls on two different days, thus making possible the abolition of the cumbersome and expensive primary system.<sup>1</sup>

Closely resembling the system of preferential voting is the Hare system of proportional representation, which is now receiving wide consideration as a remedy for the defects of plurality election of members of legislative bodies and of elective boards and commissions. No state has yet adopted it for the legislature; but, beginning with Ashtabula, Ohio, in 1915, a number of cities have taken up proportional representation for the election of members of the city council, and the system seems to be slowly growing in favor.<sup>2</sup>

preferential ballot is no longer used, owing in part to the small number of voters who indicated more than one choice on their ballots, and in part to the recent adoption of voting machines.

<sup>1</sup> R. M. Hull, "Preferential Voting and How It Works," *Nat. Mun. Rev.*, I, 386-399 (July, 1912); L. J. Johnson, "Preferential Voting," *ibid.*, III, 83-92 (Jan., 1914); "The Preferential Ballot as a Substitute for the Direct Primary," 63rd Cong., 3rd Sess., Sen. Doc. No. 985 (1915); "Municipal Elections," *Transactions Common. Club of Cal.*, XI, 173-233 (Aug., 1916).

<sup>2</sup> Proportional representation (Hare system) was adopted in Boulder, Colorado, in 1917, in Kalamazoo, Michigan, in 1918, in Sacramento, California, in 1921, in Cleveland in 1922, and in Cincinnati in 1924. The system has been held to be unconstitutional in Michigan (1920) and California (1922). See W. Anderson, "The Constitutionality of Proportional Representation," *Nat. Mun. Rev.*, XII, Supp., 745-762 (Dec., 1923); R. Moley and C. A. Bloomfield, "Ashtabula's Ten Years' Trial of Proportional Representation," *Nat. Mun. Rev.*, XV, 651-660 (Nov., 1926); C. G. Hoag and G. H. Hallett, Jr., *Proportional Representation* (New York, 1926). For additional references, see p. 700, n. 2, above.

In whatever way state and local officers are chosen, whether by appointment or by popular election, whether by means of a partisan or a non-partisan ballot, it is essential to truly democratic government that all such officials not only shall be legally responsible to the electorate, but shall be made to have a lively and continuing sense of that responsibility. How, it has been asked over and over during the past few years, can public officials be made to realize that they must exercise the powers of their respective offices, not for the advantage of any special interest or political machine, nor for the benefit of any single class in the community, but in the interest of all the people? If a legislative, administrative, or judicial officer proves unfaithful, incompetent, or otherwise unworthy of public confidence, what is the best means of getting rid of him? The perfectly obvious answer is, of course, refusal to reelect him when his term of office expires. Another almost equally obvious answer in the case of appointive officials is to bring pressure to bear upon the appointing officer to remove the unworthy appointee. In our discussion of the state executive, however, it was explained that the governor's power of removal is often so hedged about as to be a very ineffective means of enforcing a sense of responsibility on the part of high appointive state officers; and much the same sort of situation exists with respect to the removal of many appointive county and local officers. Impeachment of the principal elective state officers, including judges, is authorized in almost every state constitution; while, in the case of judges, nearly half of the states provide a further method of removal by action of the legislature.<sup>1</sup> Provision is made also in several states for the indictment, trial by jury, and removal, upon conviction, of certain elective officers found guilty of grave derelictions of duty. On the whole, however, it has to be admitted that all of these methods of enforcing a sense of accountability to the electorate are so slow and cumbersome as to be practically unworkable and entirely inadequate save in the most flagrant cases of malfeasance.<sup>2</sup>

One-fourth of the states, losing patience with these older methods of enforcing responsibility, have authorized a much more summary mode of removal, namely, a special election in which an officer may be ousted by popular vote. The recall, as this process is termed, made its first appearance in this country in the municipal

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Accounta-  
bility of  
public  
officials

Ways of  
enforcing  
responsi-  
bility

The recall

<sup>1</sup> See pp. 837-838 above.

<sup>2</sup> C. Kettleborough, "Removal of Public Officers; a Ten Years' Review," *Amer. Polit. Sci. Rev.*, VIII, 621-629 (Nov., 1914).

charter of Los Angeles in 1903. From there it has been extended, in one form or another, to cover state officers in twelve states.<sup>1</sup> It has also been made a prominent feature of the commission form of city government in most states where that system is authorized. As a rule, the device is made applicable only to elective offices, although in some cases it has been extended to appointive ones as well, on the ground that such offices are often as important politically as many elective ones.

The procedure customarily employed in bringing about removal by a recall can be explained briefly. A petition containing a statement of the charges against the official whose removal is sought, signed by a specified percentage of the qualified voters, is filed with some officer designated by law. If the petition is found to be in proper legal form, a date is set for the removal, or "recall," election, usually thirty or forty days after the petition has been filed. The officer whose recall is sought may avoid actual recall by resigning within a certain number of days after the filing of the petition; or he may be a candidate to succeed himself; and, unless he requests otherwise, his name will be placed upon the ballot without formal nomination. Other candidates may be nominated, usually by petition; and the recall election is conducted in practically the same manner as any other election. The candidate who receives the highest number of votes wins. If he is the incumbent, he remains in office and is said to be vindicated; if a rival candidate polls the highest vote, he serves during the remainder of the term, and the incumbent is said to be "recalled." It is usually provided that no petition for a recall election may be filed until an official has served for a stipulated period of time, commonly six months. As a rule, a second recall election cannot be ordered during the term for which an official was elected.

Merits of  
the recall

The chief claim put forward in support of this drastic method of getting rid of unsatisfactory office-holders is that, in view of the ease with which it can be set in operation, it is far more effective in bringing home to public officials a proper sense of their responsibility to the people than any of the older methods of removal enumerated above. Faced by the possibility of being recalled at almost any time before the end of his term, no official can feel free

<sup>1</sup> Oregon (1903), California (1911), Colorado, Washington, Idaho, Nevada, and Arizona (1912), Michigan (1913), Louisiana and Kansas (1914), North Dakota (1920), and Wisconsin (1926). Actually, however, Idaho is without the recall, inasmuch as the legislature has not passed the necessary legislation under the authority conferred by the constitutional amendment of 1912.



to cut loose from his constituents in the consciousness that he is practically certain to serve out his full term. The device also tends to substitute a healthy sense of accountability to the public for an all too common sense of dependence upon political bosses and machines. The chief value of the recall, in the opinion of some, lies in the possibility it holds out of lengthening the terms of many public officers. These can safely be made longer when the officer can be removed practically at any time by resort to the recall. Lengthened terms would, of course, mean longer experience in office, and thus would tend to bring about greater efficiency in the performance of official duties, more continuity in administrative policies, and elimination of a great amount of waste and inefficiency now traceable to "labor turnover" in the public service.

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On the other hand, the recall has such grave limitations that it can hardly be regarded as an ideal method of terminating an official career. Such a method should operate expeditiously, guarantee a fair trial for the official, provide for full presentation of the facts, ensure a fairly intelligent and impartial trial body, and render reasonably certain that the decision as to removal or retention in office is based upon relevant facts, and not upon extraneous considerations. In applying these standards to the recall, one must take into account the different kinds of duties attached to various public offices, and also the different kinds of charges that are likely to be preferred in a recall petition. It will then be found that, as a corrective for official misconduct or incompetence, the recall is likely to function satisfactorily only when applied to officials who serve mainly in a representative capacity—*e.g.*, members of state legislatures, city councils and commissions, and certain administrative boards or commissions—and to such executive officers as the governor, attorney-general, mayor, and corporation counsel; and also possibly to the higher judiciary when passing upon the constitutionality of laws enacted under the police power.<sup>1</sup> In such cases, the recall presents to the voters a comparatively simple issue, namely: Has this officer fairly and truly represented or reflected our opinion in the part that he has taken in determining public policy? It is only under such circumstances—and not always even then, it is to be feared—that the recall can be said to approach the ideal means of enforcing a due sense of official responsibility to the electorate.<sup>2</sup>

Limita-  
tions of  
the recall

<sup>1</sup> See 838-840 above.

<sup>2</sup> A. B. Hall, *Popular Government*, Chap. ix.

Although the recall is usually made available for the removal of all classes of elective officials, it has been resorted to in surprisingly few instances, quite contrary to the early predictions of opponents. No exact figures are available, but it appears that the number of recall elections since 1903 has not exceeded one hundred and fifty, and that the number of officials who have been removed in this manner is not over sixty or seventy. The great majority of recall elections have been directed at city officials. Nearly twenty years elapsed after the recall first appeared before it was used against any officer chosen by the voters of an entire state; and as yet there have been only two instances of this sort. In 1921, the governor, attorney-general, and commissioner of agriculture in North Dakota were recalled because of their connection with certain issues growing out of the Non-Partisan League movement.<sup>1</sup> The other case occurred in Oregon in May, 1922, when two members of the state public utility commission were recalled, because of popular dissatisfaction with certain rate increases which the commission had authorized.<sup>2</sup>

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<sup>1</sup> *Nat. Mun. Rev.*, XI, 3-5 (Jan., 1922); *Literary Digest*, LXXI, Oct. 22, 1921, pp. 12-13; *ibid.*, LXXI, Nov. 19, 1921, p. 10.

<sup>2</sup> One commissioner had been elected by the entire state, the other from a district. *Nat. Mun. Rev.*, XI, 212-213 (July, 1922). See also J. D. Barnett, *Operation of the Initiative, Referendum, and Recall in Oregon* (New York, 1915), Pt. II; D. F. Wilcox, *Government by All the People* (New York, 1912), Chaps. XXIV-XXVI; H. S. Gilbertson, "Conservative Aspects of the Recall," *Nat. Mun. Rev.*, I, 204-211 (Apr., 1912); F. S. Fitzpatrick, "Some Recent Uses of the Recall," *ibid.*, V, 380-387 (July, 1916); C. A. Beard and B. E. Shultz, *Documents on the State-Wide Initiative, Referendum, and Recall* (New York, 1912), 52-69, 242-279; *Equity*, XVIII (Oct., 1916), containing reports on the use, or attempted use, of the recall in a large number of states; J. O. Garber, "The Use of the Recall in American Cities," *Nat. Mun. Rev.*, XV, 259-261 (May, 1926).

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## PART V

### LOCAL GOVERNMENT AND ADMINISTRATION

#### CHAPTER XXXIX

##### THE COUNTY AND ITS GOVERNMENT

Relation  
between  
the states  
and local  
government  
areas

As has been apparent throughout the preceding group of chapters, it is but a step from the government of the state to that of the county, city, town, township, village, or other local political division. All of these local government areas (or political subdivisions, as they are called collectively) are created and endowed with powers by the state exclusively; the national government has nothing to do with such matters. Every state has complete authority to devise its own scheme of local government, and may modify it at will from time to time. Thus our forty-eight states become so many useful laboratories, or political experiment stations, in each of which may be tested various public policies and different schemes of local government.

The relation between the state and its subdivisions is totally different from that existing, on the other side, between the state and the United States. In the latter case, the smaller area is not, except in some more or less incidental ways, an administrative division existing for the use and convenience of the larger; on the contrary, it is, within limits, a separate, sovereign area of government, on a footing of equality with the nation itself. The county, city, and township, on the other hand, while organized partly to meet the demand for local control of local affairs, exist by no original or inherent right, have no reserved or residual powers, and are extensively employed by the state in the enforcement of its laws, the collection of its revenues, and the performance of many of its administrative functions. In other words, the United States is organized on a federal basis, while the governmental system of each state is strictly unitary. The inhabitants of all of these subdivisions enjoy more or less extensive rights of local self-government. Nevertheless, the subdivisions are themselves crea-

tures of the state constitution or state statutes; and, subject to a steadily increasing number of constitutional restrictions, the legislature may exercise almost unlimited authority over them, altering or abolishing their existing forms of government, and, if it chooses, depriving the inhabitants of practically all voice in their local affairs without consulting them. On the other hand, the legislature may grant them almost complete local self-government, or what is commonly called "home rule."

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In an earlier chapter, we have seen that two distinct types of local government arose in the seaboard colonies before the Revolution, one of them in New England and the other south of the Potomac; and that in the middle colonies a mixed type developed, embracing some features found in the New England town and others characteristic of the southern county.<sup>1</sup> These two or three systems served their purpose so well that when independence was achieved few and slight changes were made in them. Indeed, in most respects they are about the same to-day as a century and a half ago. Such alterations as have been made pertain not so much to structural arrangements as to the methods of choosing the local officers and to the supervision of these officers by the state authorities.<sup>2</sup>

Early  
types of  
local or-  
ganization

As the nation expanded westward after the Revolution, the settlers from the older eastern states, moving, as a rule, along parallels of latitude, transplanted in the new states the system of local government with which the majority in each case had been most familiar in the old home-state. Hence the county is the principal unit of local government in southern and south central states, while the combined county-township system predominates in the north central states. In Michigan, Illinois, Wisconsin, and Minnesota, whose early settlers came mainly from New York and New England, the township is relatively a more important area than in states whose first white inhabitants came largely from the South, *e.g.*, Ohio, Indiana, Kansas, and Nebraska, where the county preponderates. Sometimes two lines of migration, one from the old South and the other from the old North, meeting in a single state, have effected a compromise whereby the inhabitants of each county are permitted to decide for themselves whether they will

Spread of  
county and  
township  
government

<sup>1</sup> See Chap. IV above.

<sup>2</sup> On the historical development of local government, see H. G. James, *Local Government in the United States*, Chap. II; K. H. Porter, *County and Township Government in the United States*, Chaps. III-IV; J. A. Fairlie and C. M. Kneier, *County Government and Administration* (New York, 1930), Chaps. I-III.

subdivide the county into townships or retain the county unit intact. This has happened both in Illinois and Nebraska. In the former, eighty-six out of the one hundred and two counties have adopted the township system; in the latter, twenty-seven out of a total of ninety-three.

In addition to this transplanting and readaptation of older local government institutions in the western country, three main developments since the Revolution are to be noted. The first may be described as the democratizing of local government, including both the conversion of appointive offices into elective offices and the broadening of the suffrage. These changes naturally accompanied similar steps in connection with state offices, already described. The second development is the growth of cities, giving rise to many of our most urgent and difficult problems of local government to-day. This phenomenon appeared in the first half of the nineteenth century, and to date shows no sign of being permanently checked. Of late, there has been a marked tendency in some sections of the country to subdivide cities, townships, or counties, or to combine the whole or portions of two or more of these local government areas into new municipal corporations, under varying names, for the more effectual carrying on of some community enterprise. A third development is no less important. Although the principal local officials continue to be chosen almost uniformly throughout the country by popular election, with no intervention from the state authorities, their official activities are being more and more strictly defined by state laws imposing specific duties upon them; and are also being increasingly circumscribed by state supervision over them in the performance of their duties. These tendencies are especially to be noted in the administration of public education, the enforcement of regulations pertaining to public health, the collection and expenditure of local taxes and other revenues, and the rates and services imposed upon public utilities. Numerous illustrations will appear as we proceed.

The largest, although not always the most important, local government area is, in every state except Louisiana, the county; there the principal political subdivision, corresponding to the county elsewhere, is the parish. Most states have from sixty to one hundred counties. In Delaware and Rhode Island, however, there are only three and five, respectively, while in Texas there are 254. Massachusetts, with fourteen, has the smallest number in propor-

tion to population.<sup>1</sup> New York county and San Bernardino county, California, have the distinction of being, respectively, the smallest and the largest of counties, the former having an area of only twenty-two square miles, while the latter comprises 20,175 square miles, an area almost equal to that of Massachusetts, Connecticut, and New Hampshire combined. The most common areas are between four hundred and six hundred square miles. In population, also, there is great variation, running all the way from Armstrong county in South Dakota, which at the census of 1930 had only eighty inhabitants, up to Cook county, Illinois, with nearly four millions. The majority have populations somewhere between ten and thirty thousand. The greater number are rural in character; hardly more than one-sixth have any urban communities of over 8,000 inhabitants.

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The county has been well termed the "dark continent of American politics;" for the average citizen takes little interest in, and knows almost nothing about, his county government and its activities. Nevertheless, the county is, from a number of points of view, a very important governmental unit. (1) It is a much used unit for the administration of state laws, especially such as relate to taxation and the prevention and punishment of crime. (2) It is a leading area of judicial administration, being the sphere of justices of the peace, the surrogate or probate court, the county court, and of the officials connected therewith, notably the sheriff and the prosecuting attorney. In the county court, almost all important law-suits and prosecutions for serious criminal offenses are begun; and to this court, minor civil and criminal actions may be carried on appeal from the city and rural justice-courts. Every county maintains a court-house and at least one penal or correctional institution. (3) The county is an important recording agency for a large variety of documents, including deeds and mortgages, surveys of land plats, wills, and court proceedings. (4) Outside of New England, the county is an important district for school purposes, with an elective superintendent of schools who exercises more or less supervision over public schools, especially those located outside of cities or incorporated towns and villages, which frequently are removed from the jurisdiction of the county superintendent.<sup>2</sup> Since 1898, the establishment of free county circulating

County  
functions

<sup>1</sup> In 1930, there were 3,072 counties in the country as a whole.

<sup>2</sup> F. H. Harrin, "County Administration of School Affairs in its Relation to the State Department," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 153-165 (May, 1913).

libraries for the benefit of people in the rural sections and in small towns or villages has been authorized in thirty-six states, where nearly three hundred county libraries are to be found.<sup>1</sup> (5) The county, in most sections of the country, is the principal agency for laying out and repairing highways and constructing and maintaining bridges. (6) The charitable or welfare work done by counties constitutes one of their most important functions in many parts of the country. The county poor-farm or almshouse is a familiar institution outside of New England, and not altogether unknown there. In populous counties, one not infrequently finds county hospitals; and a variety of other welfare activities are carried on under the auspices of the county government. In Cook county, Illinois, for example, about one-half of the total county budget, which in recent years has aggregated approximately twenty million dollars, has gone for charitable or welfare activities of one kind or another.<sup>2</sup> Nearly five hundred county hospitals have been established in about twenty states, beginning with California in 1873.<sup>3</sup> (7) In a number of respects, the county is an important political unit: the selection of polling-places, the appointment of election officials, and canvassing the votes cast at primaries and general elections are commonly made county functions. Counties are also units of representation in one or both branches of the state legislature; they are important units in the state party organizations; and, lastly, they have often been convenient subdivisions for determining questions of public policy, such as authorizing or prohibiting the sale of liquor under local option laws.<sup>4</sup>

<sup>1</sup> In California, all but twelve of the fifty-eight counties now (1931) have county libraries, and for their maintenance are spending nearly \$1,500,000 annually. These libraries have four and a half million volumes, and serve the people through over 1,600 community branches and by supplying over 2,400 school districts. Cf. W. A. Dwyer, "Putting Character into Counties," *World's Work*, XXX, 604-613 (Sept., 1915); E. A. Lathrop, "County Libraries Contribute to Intelligence of Rural Communities," *School Life*, XIII, 163-166 (May, 1928); *U. S. Daily*, May 18, 1928, p. 720; *Library Journal*, LIV, 643-659 (Aug., 1929).

<sup>2</sup> Cook County, *Charity Service Reports* (1922).

<sup>3</sup> K. H. Porter, *County and Township Government in the United States*, Chap. XII; F. G. Nifong, "A County Hospital in a Missouri Town," *Amer. City*, 610-614 (Dec., 1923); J. A. Kingsbury, "Cattaraugus County and Our Rural Health," *Nat. Mun. Rev.*, XVI, 363-369 (June, 1927); E. F. Harris "Charity Functions of a Pennsylvania County," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 166-181 (May, 1913); C. M. Kneier, "Development of Newer County Functions," *Amer. Polit. Sci. Rev.*, XXIV, 134-140 (Feb., 1930).

<sup>4</sup> J. A. Fairlie and C. M. Kneier, *County Government and Administration*, Chap. x; C. L. Jones, "The County in Politics," *Amer. Polit. Sci. Rev.*, XLVII, 85-100 (May, 1913); H. O. Owen, "The County Boss," *Amer. Mercury*, XVII, 70-74 (May, 1929).



The county, like the city, is a governmental subdivision of the state, endowed with certain rights and powers. As a quasi-municipal corporation, it can acquire, hold, and dispose of both real and personal property, make contracts, and sue and be sued in the courts. Its corporate powers are, however, less extensive and varied than those of an ordinary city, being indeed quite incidental and secondary in importance to its governmental functions. Furthermore, its powers are seldom granted in a single document like the city charter or a general municipal code, but are usually to be found scattered through a score or more of statutes passed at different times by the state legislature. Like the city, the county is legally the creature of the legislature, which, in the North Atlantic states and some others, is quite free to create, combine, or abolish counties and to extend or limit their powers, regardless of the wishes of the inhabitants and unhampered by any constitutional limitations. In most states, however, constitutional provisions protect counties against legislative annihilation or impairment.<sup>1</sup>

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Legal  
status

Not only do constitutional stipulations limit the power of the legislature in dealing with counties; frequently they also limit the power of counties themselves. Among the most common of the latter sort of restrictions are provisions setting a limit to the rate of taxation which may be authorized by county officials, and prohibiting counties from incurring indebtedness beyond a specified amount. Not infrequently, however, these debt limits may be exceeded for some particular object after special authorization by the legislature or after a popular referendum. The powers of both the legislature and the county are further curtailed in about two-thirds of the states by constitutional provisions specifically naming the officers which each county must have and fixing the amount and method of their compensation. None of the offices thus provided for can be abolished; nor may the method of filling them be changed, either by the county or by the legislature. Herein, it will be perceived, lies one of the most serious obstacles to the adoption of a shorter ballot. At the same time, the legislature is generally free to create as many additional offices as it sees fit.

Restrictions on  
counties

To the governmental organization of counties, very little thought appears to have been given by constitutional conventions, state legislatures, or the general public—at all events, in comparison with

Organiza-  
tion of  
county  
government

<sup>1</sup> J. A. Fairlie and C. M. Kneier, *County Government and Administration*, Chaps. IV-V.

the amount of attention bestowed on the governments of states and cities. There is everywhere a large number of elective county officials; but no distinction has been made between policy-determining offices, which may appropriately be filled by popular election, and purely ministerial offices, the filling of which by popular election serves no useful public purpose. Curiously, furthermore, county government all over the country has been organized in entire disregard of the traditional three-fold division of governmental powers, with its concomitant system of checks and balances. The county courts which one finds everywhere, together with their officials, are merely parts of the state judicial machinery, not a coördinate branch of county government; and county legislative functions, which indeed are extremely few, are assigned to a body whose work, like that of the commission in commission-governed cities, is almost wholly administrative. This agency, commonly known as the county board, comes nearest to being the central governing body; and it, chiefly, calls for somewhat detailed consideration.

The board  
of county  
commis-  
sioners or  
supervisors

A county board is found in all states except Georgia and Rhode Island, and is everywhere an elective body, except in Connecticut, where the members are appointed by the state legislature, and in the majority of South Carolina counties, where they are appointed by the governor on recommendation of the local members of the legislature. The usual term is two years. The board bears different names in different parts of the country, and its composition varies greatly in different states. Where there are townships, and in a few other states as well, it is called the board of supervisors; in states or counties without township government, it is commonly known as the board of county commissioners. Sometimes boards of supervisors and boards of commissioners are found in the same state, as in Illinois, where eighty-five counties have the former and sixteen counties the latter, while a special board has been created for Cook county.

A board of supervisors is composed, in most states, of representatives elected from the various towns and cities in the county, one generally being chosen from each town or city ward. Seldom is there any attempt to apportion representation on a population basis, although something has been done in this direction in Illinois, where one supervisor is allotted to every township, regardless of its size, and an assistant supervisor to each town for every 2,500 population over four thousand. This results in many large boards,

eighteen Illinois counties having boards with thirty or more members, while in one county (La Salle) the board numbers fifty-three. Such large boards are, however, found only in New Jersey, New York, Michigan, Virginia, and Wisconsin,<sup>1</sup> and parts of Arkansas, Kentucky, and Tennessee. In the majority of states, there are small boards of county commissioners consisting of three, five, or seven members, elected from the county at large in Ohio, Pennsylvania, Maryland, and South Dakota, and chosen in districts into which the county is subdivided in Indiana, Iowa, Minnesota, Kansas, Nebraska, North Dakota, and California.<sup>2</sup>

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Almost nowhere is there any chief executive officer in the county board; each board elects its own chairman, but he has no veto upon the acts of the board and little, if any, more power in other respects than any other member. Exceptions are to be found in the president of the Cook county board in Illinois, who is elected directly to that office by the voters and has a veto upon the acts of the board, including appropriations, and who also has important appointing powers; and in the county supervisor in Essex and Hudson counties, New Jersey, who is similarly chosen and has much the same authority.<sup>3</sup> But the possibilities of leadership and control connected with these positions have never been developed by any incumbent in either Illinois or New Jersey.

Absence of  
a chief  
executive

Like city councils, county boards, in general, can exercise only such powers as are expressly conferred on them by statute or are clearly necessary to the performance of their public functions. Even in the same state, county boards will sometimes be found with greatly varying powers, owing to the large amount of special county legislation which has been enacted from time to time. The county board is, however, for most purposes the general public agent by which the powers of the county are exercised; and a detailed study of the work of these bodies throughout the country will show that commonly, though not in every state, their duties and powers relate to (1) financial matters, (2) county property and public works, (3) elections, (4) charities and corrections, (5) the appointment and supervision of county officers, and (6) a large variety of miscellaneous matters.

Powers of  
the county  
board:

<sup>1</sup> The legislature of Wisconsin passed a law in 1921 permitting counties to adopt, in place of the large board of supervisors, a governing body of five commissioners, elected in rotation from districts of substantially equal population. Only two counties, out of a total of seventy-one, have taken such action.

<sup>2</sup> Called supervisors in California, Iowa, and Nebraska.

<sup>3</sup> W. Paul and H. S. Gilbertson, "Counties of the First Class in New Jersey," *Amer. Polit. Sci. Rev.*, Supple., VIII, 292-301 (Feb., 1914).

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## 1. Finance

The financial activities of the county board include levying taxes for county purposes; <sup>1</sup> levying the county's share of the general property tax for the support of the state government; authorizing and arranging for loans on the credit of the county, usually through bond issues; equalizing, in many states, the assessment of taxes among the different townships and cities in the county; serving, in some states, as a board of review to hear and decide appeals of tax-payers from property valuations made by local assessors; passing upon the allowance of all bills and accounts against the county, where there is no separate county auditor or comptroller; fixing the salary or other compensation of minor county officials and employees; and, in practically all states, making appropriations of county funds for various county purposes.

2. Custody  
of county  
property

The county board is the official custodian or trustee of all county property, real and personal, including the court-house, jail, work-house, poor-farm or almshouse, hospitals, and libraries; and is required to lease or erect buildings suitable for the use of all county officers. In some sections of the country, the board also undertakes various public works, such as locating, constructing, and repairing the most important roads, building the principal bridges, erecting levees or dikes, and constructing drains, ditches, and irrigation works. Usually, however, such public works and the erection of county buildings are left to private parties, in which case the necessary contracts are awarded by the county board. Similarly, to the county board falls the duty of letting contracts for printing, and for purchasing equipment for county buildings, office supplies, and materials used in county institutions. The opportunity thus afforded to strengthen themselves politically in dispensing this patronage is not lost upon the practical-minded members of the board; indeed, this is the phase of county business in which they often seem most keenly interested.<sup>2</sup>

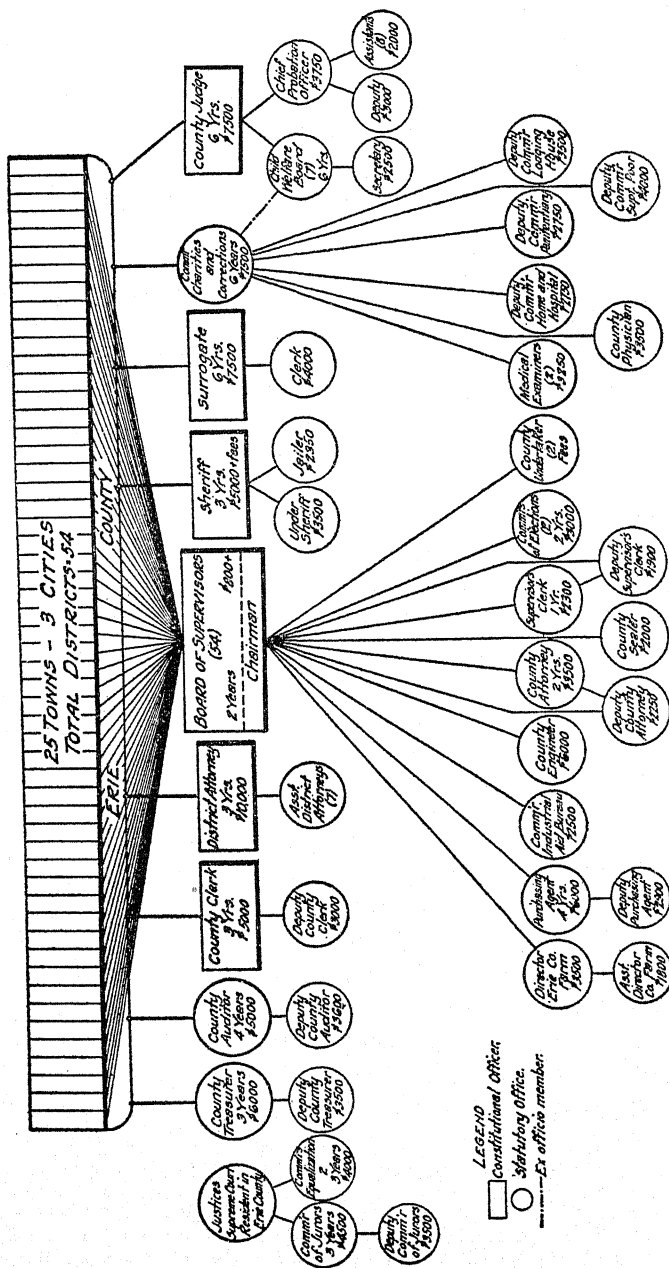
3. Control  
of elec-  
tions

In most states, outside of New England, the county board marks out voting precincts, designates polling places, appoints election officials, prepares, prints, and distributes the ballots used on primary and election days, and, after the election is over, serves as a board to canvass the results of primaries and general elections, which are certified by it to the proper county and state officers.

For the charitable and other welfare work of the county, the

<sup>1</sup> J. A. Fairlie and C. M. Kneier, *County Government and Administration*, Chaps. XVIII-XIX.

<sup>2</sup> K. H. Porter, *County and Township Government in the United States*, 120-124.



# COMMUNIST ORGANIZATION IN A POPULOUS NEW YORK COUNTY.

(Report of New York Special Joint Committee on Taxation and Retrenchment, 1923.)

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vision of  
charities  
and cor-  
rections

county board is ultimately responsible. The administration of the county jail, the poor-farm or the almshouse, the county hospital, and other similar institutions, and the carrying on of varied forms of welfare activity, come within its general jurisdiction; although the actual management of these institutions may be delegated to other elective or appointive officials. Frequently the patronage attached to the poor relief and charitable work of the county is considerable, subjecting the officials in charge of it to much local pressure, both political and social.<sup>1</sup>

5. Appoint-  
ments

Outside of the most populous counties, the appointing power of the county board is not extensive, and its power of removal is even less so. In one state or another, the county board appoints the overseer of the poor, the superintendent of the workhouse, a county attorney, drainage or highway commissioners, election boards, a county physician, a county health officer or health board, a "commissioner of Canada thistles," fence viewers, mine inspectors, a county treasurer and an auditor, a superintendent of highways, a county farm adviser, a county engineer, and a purchasing agent. Vacancies occurring in elective county offices may also sometimes be filled by action of the board. In populous counties, where many activities are carried on by the county government, the board is likely to have the power to fill a very large number of positions on the county payroll,<sup>2</sup> and the appointments frequently show the spoils system at its worst. In upwards of thirty such counties, however, a serious attempt has been made to eliminate, or at least to reduce, this evil by the introduction of competitive civil service examinations.<sup>3</sup>

6. Miscella-  
neous

The miscellaneous matters falling to county boards include the issuing of licenses for certain trades or occupations, such as liquor-selling, keeping hotels or inns, auctioneering, peddling, and operating ferries; offering bounties for the destruction of wild animals or noxious weeds; regulating fishing; safeguarding grade-crossings; incorporating literary and benevolent societies; preparing lists of persons eligible to serve as jurors in the courts; serving

<sup>1</sup> J. A. Fairlie and C. M. Kneier, *County Government and Administration*, Chap. xiv.

<sup>2</sup> In Cook county, Illinois, there are over three thousand such positions.

<sup>3</sup> Local civil service commissions and rules are to be found in Alameda, Los Angeles, and San Francisco counties, California; Milwaukee county, Wisconsin; Cook county, Illinois; and Wayne county, Michigan; also Denver, St. Louis, and Baltimore. State civil service rules have been extended to seventeen of the more populous counties in New York, to seven New Jersey counties, and to some counties in Ohio, notably Cuyahoga (Cleveland). See J. A. Fairlie and C. M. Kneier, *County Government and Administration*, Chap. xi.

as a board of health, and as a forest preserve board; and organizing townships, school and road districts, and other county subdivisions created for various purposes.

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Besides the county board, every state except Rhode Island has six or more elective county officers. In Illinois, there are from nine to fifteen such officers in most counties; while in Cook county there are over eighty, counting the judges of the circuit and superior courts. All of these elective officers are largely independent of one another and of the county board, and usually of the higher state officials as well. In Rhode Island, there are only two county officers, the sheriff and the county clerk, both of whom are appointed by the legislature. Of the numerous county officials, with widely varying titles and duties throughout the country, the most important are the sheriff and the prosecuting attorney.

Other  
county  
officers:

The sheriff is found in every state in the Union, and is everywhere an elective official except in Rhode Island. His term is generally two years, although three-year and four-year terms are not uncommon; and in a number of states the constitution makes him ineligible for immediate reelection. He has the right to appoint an almost unlimited number of deputies, whose powers become the same as his own; and he is made responsible for all their official acts. In some states, the sheriff receives a salary; but usually both he and his deputies are paid by fees, which, in the largest counties, sometimes mount to tens of thousands of dollars a year. This fact, and the further circumstance that in such counties a large number of subordinate positions, clerical and otherwise, are connected with the office and generally filled by the sheriff without civil service restrictions, makes the office one of the chief prizes for which local politicians strive.

1. Sheriff

The duties most commonly assigned to the sheriff fall into two main groups: those relating to the preservation of the public peace, sometimes called police duties, and those connected with the operation of the courts. On paper, the sheriff's police duties are very extensive. They include the control of the county jail, the arrest and safe-keeping of persons charged with crimes or misdemeanors, and the enforcement of statutes against gambling, vice, and liquor-selling. Except in some of the more sparsely settled portions of the country, these powers, in actual practice, are of limited scope. No county police, corresponding to city police forces, is at the sheriff's command, and the town constables and village and city police forces are in no way subject to his control.

Police  
duties

In time of public disorder, therefore, the sheriff's power to appoint additional deputies and to summon the *posse comitatus*, or general body of citizens, to aid him in protecting life and property generally amounts to nothing, and he is obliged to call upon the governor of the state for the assistance of the state militia or—where such a body exists—the state police.<sup>1</sup>

The greater portion of the sheriff's time is consumed in the performance of duties as the executive agent of the courts. At each session of the county and higher courts, he is present, either in person or by deputy; he opens and closes court sessions with a formal proclamation, and maintains a proper degree of decorum; he serves the various writs and other processes in connection with civil suits, and also warrants for the arrest of persons accused of crimes and subpoenas for the attendance of witnesses; he carries out the judgment of the court in civil cases, and executes the sentence of the court upon persons convicted of crimes or misdemeanors. In addition, he is *ex-officio* tax collector in some southern states, and in some counties in Illinois, California, and Texas; he sometimes issues proclamations announcing the approach of primaries or elections; and in a few southern states he serves as public administrator of the estates of deceased persons who leave no heirs or relatives.

Although sheriffs are elected locally, they are, in law, agents of the state; and many, if not most, of their functions have to do with the enforcement of state laws. In but very few states, however, do the higher state officials exercise an effective control over them. In Michigan, New York, and Wisconsin, the governor may remove a sheriff for cause; and in Illinois, he must remove a sheriff who allows a prisoner to be taken from his custody by a mob.<sup>2</sup>

Of equal or greater importance is the public prosecutor, who is known by different titles in different states, such as state's attorney, district attorney, and county solicitor. Generally, such an official is elected in each county; but in some states the attorneys are chosen in districts comprising more than one county; in which case their jurisdiction is not restricted to a single county but extends throughout their district. In a very few states, the attorney is appointed by the governor,<sup>3</sup> or by the judges of some court, as in Connecticut. Selected in most instances county by county, and

<sup>1</sup> K. H. Porter, *op. cit.*, 162-182.

<sup>2</sup> Cf. J. A. Fairlie and C. M. Kneier, *op. cit.*, Chap. vi.

<sup>3</sup> Alabama, Florida, Georgia, and New Mexico.



by popular election, public prosecutors inevitably vary greatly in character and abilities; and they are likely to reflect the dominant sentiment of their communities toward law enforcement, a fact that partly explains the unfortunate lack of uniformity in the enforcement of laws against gambling, vice, liquor-selling, and other offenses in different parts of the same state. In order, therefore, to tone up county law-enforcement, the Louisiana constitution requires the attorney-general to supervise the work of all the district attorneys; other states merely permit the attorney-general to aid locally elected prosecutors in handling cases of unusual importance; in still other parts of the country, the attorney-general (sometimes a state court) is authorized to appoint special prosecutors either to assist, or entirely to supersede, the local attorney. However chosen and supervised, the prosecuting attorney is paid a salary in a number of states, and is recompensed with fees in others; but the tendency is to substitute salaries for the fee system.

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The most conspicuous duties of the prosecuting attorney, as the title implies, relate to the enforcement of criminal statutes; and the extent to which crime is repressed depends largely on the ability, energy, good judgment, and character of this official. He investigates crimes which come to his attention through the public press, the police, or on complaint of private citizens; he institutes proceedings for the arrest and detention of persons accused or suspected of crimes, and of important witnesses whose departure from the state is anticipated; he commences criminal actions where the facts in his judgment warrant it, either by filing an information with the proper court or by drawing up indictments and submitting evidence in support of them to a grand jury; and he conducts, either in person or by deputy, the trial of criminal cases.<sup>1</sup> To his recommendations concerning the fixing of bail, the discontinuance or nolle-prossing of criminal actions, and the severity of sentences to be imposed, courts generally give serious consideration. His criminal jurisdiction often extends also to public officials as well

Duties

<sup>1</sup> In order that poor persons charged with crimes or misdemeanors may have better legal advice and honest representation at their trial, the office of public defender has been created in some parts of the country, notably in Los Angeles county, California, in 1914. See W. J. Wood, "Necessity for Public Defender Established by Statistics," *Jour. Crim. Law and Criminol.*, VII, 230-235 (July, 1916), and "The Public Defender," *Rev. of Revs.*, LXI, 303-307 (Mar., 1920); M. C. Goldman, *The Public Defender* (New York, 1917); A. M. Barrow, "Public Defender: a Bibliography," *Jour. Crim. Law and Criminol.*, XIV, 556-572 (Feb., 1924); R. H. Smith, *Justice and the Poor* (New York, 1919), Chap. xv; S. Rubin, "The Public Defender an Aid to Criminal Justice," *Jour. Crim. Law and Criminol.*, XVIII, 346-364 (Nov., 1927).

as to private persons, so that it becomes his duty to bring to trial officers whom he deems guilty of official misconduct or against whom some competent court directs him to proceed. Unfortunately, however, the close political affiliations of prosecuting attorneys with corrupt municipal or other local officials has often led them to ignore or neglect this function.

The office is indeed one of enormous responsibility, and possessed of almost unlimited possibilities for good or evil.<sup>1</sup> Its control, in counties having large cities, is a political prize of tremendous importance to both the law-abiding classes and the criminal and vicious elements interested in lax law-enforcement and a "wide-open town." Election contests for it have at times quite overshadowed in the popular mind the other phases of a municipal or state campaign. "Beyond question such an office should be entrusted to none but a lawyer of eminent attainments who is a citizen of the highest character, interested in the public good, of unquestioned integrity, of exceptional poise, of great personal force, and fearless in the discharge of duty." Not a few men who have attained national prominence in public life first won distinction, and later political advancement, through their courageous and efficient administration of the office of prosecuting attorney, e.g., in New York City,<sup>2</sup> St. Louis, San Francisco, and Cook county, Illinois.

In most states, the prosecuting attorney also has important civil duties: he is the legal adviser to most, if not all, of the county officials; he draws up and passes upon the validity of county contracts; he institutes and conducts suits brought by the county and defends those brought against the county, or against any officer thereof in his official capacity; he prosecutes all cases of forfeited official or jail bonds; and frequently he coöperates with the attorney-general of the state in the handling of important cases affecting the county.

The office of coroner is of nearly the same antiquity as that

<sup>1</sup> Cf. R. Moley, *Politics and Criminal Prosecution* (New York, 1929), Chap. III.

<sup>2</sup> The organization and work of the district attorney's office in New York City is interestingly described by a former incumbent, C. A. Whitman, in his article, "The World's Greatest Prosecuting Office," *Rev. of Revs.*, XLIX, 705-713 (June, 1914). Cf. H. S. Gans, "The Public Prosecutor; his Powers, Temptations, and Limitations," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 120-133 (May, 1913); K. H. Porter, *op. cit.*, Chap. x; "What is Wrong with the Prosecutor?," *Jour. Amer. Judic. Soc.*, XI, 67-68 (Oct., 1927); W. M. Pickett, "The Office of Prosecutor in Connecticut," *Jour. Crim. Law and Criminol.*, XVII, 348-358 (Nov., 1926).

of sheriff, but is now far less important. Almost everywhere, the coroner is an elective official, although in six or seven states he is appointed by the county board or by the judges of one of the higher courts. In Rhode Island, he is appointed by the town council, and therefore is not a county official at all. The main duty of the coroner, as set forth in a New York statute,<sup>1</sup> is to investigate the circumstances under which any person has died "from criminal violence or by casualty, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious or unusual manner." Elsewhere, the scope of the coroner's functions is often somewhat more restricted. In actual practice, in most states, the office really forms a part of the machinery of criminal justice, and only in cases where a crime is involved, or thought to be involved, do the findings of the coroner or his jury have any special significance. "To perform his duties properly, a coroner should be both a criminal lawyer and a specialized medical expert; but those elected can usually lay claim to neither qualification." In many cities, the office is nothing but a booby prize awarded to some insignificant adherent of the dominant political machine. There should, of course, be the closest harmony and coöperation between the coroner and the prosecuting attorney; but not infrequently the two pull in opposite directions.

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3. Coroner

County clerks are found in about one-half of the states. They are usually elected for two-year or four-year terms; but in Rhode Island they are chosen annually by the legislature, and in Vermont they are appointed for an indefinite term by the assistant judges of the county court. In some states, the county clerk has a great variety of tasks to perform. In Illinois he is becoming, indeed, the chief executive officer of the county; and in New York he has duties in connection with the administration of at least a score of important state laws.<sup>2</sup> But, as a rule, his functions are neither numerous nor important.

4. Clerk

In almost all states, even where the county clerk serves as clerk of the county court, there are one or more separately elected or appointed court clerks. Both county clerks and court clerks may appoint deputies, for whose official acts they are responsible. Court clerks keep the minutes of court proceedings and orders, and have

5. Court  
clerks

<sup>1</sup> For illustrations of the trivial duties imposed upon coroners in New York, see *Proceedings of the Conference for the Study and Reform of County Government* (Second Meeting, Jan. 22, 1914), pp. 11-16.

<sup>2</sup> R. S. Childs, "Ramshackle County Government," *Outlook*, CXIII, 39-45 (May 3, 1916).

custody of the records and the court seal. "They docket all cases for trial, filing all papers in each case together. They issue proper processes or writs at the beginning, during, and at the end of each suit, and also enter judgments rendered by the court. They certify to the correctness of transcripts from the records of the court, and preserve the property and money in the custody of the court. Their duties are for the most part purely ministerial; but some functions imposed by statute, such as the assessment of costs, the approval of bonds, and the assessment of damages in cases of default, are quasi-judicial."<sup>1</sup>

6. Other  
county  
officers

Other appointive or elective county officers, found in one state or another, can be barely mentioned. To describe them would be wearisome; besides, their nature and functions are sufficiently indicated by their names. Among them are the treasurer, auditor or comptroller; register of wills; register of probate; recorder of deeds; jury commissioners; jail commissioners; prison wardens; prison inspectors; jail physicians; mercantile appraisers; election boards; superintendent of schools; director, overseer, or superintendent of the poor; superintendent of the work-house; surveyor; road or highway commissioner; boards of assessors; and boards of review.

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<sup>1</sup> J. A. Fairlie and C. M. Kneier, *County Government and Administration*, 156.

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## CHAPTER XL

### CRITICISM AND RECONSTRUCTION OF COUNTY GOVERNMENT

County  
government  
not satis-  
factory

Twenty years ago, county government was a labyrinth whose intricate windings were known only to the professional politicians. More recently, a few disinterested explorers have penetrated the jungle in different states, notably New York, Illinois, North Carolina, and Virginia, and have given to the public some interesting reports of what they have found. These accounts indicate that, in general, the county has been practically untouched by the reform movements which have wrought so effectively for better government in city and state; that no state in the Union has worked out a thoroughly satisfactory system of county government; that, almost everywhere, cumbersome governmental machinery and antiquated business methods persist,<sup>1</sup> and divided, diffused, and diluted authority and responsibility prevail and, for the most part, pass practically unchallenged. A report of a committee on county government maintained by the National Municipal League declared in 1917 that "county government is the most backward of all our political units, the most neglected by the public, the most boss-ridden, the least efficiently organized and most corrupt and incompetent, and, by reason of constitutional complications, the most difficult to reform." Doubtless such a sweeping indictment could not be sustained on every count in all parts of the country. But in all of our larger states one or more counties could probably be found in which all of these charges could easily be substantiated; while one or more of the allegations could be proved true of practically every county in any state.

Principal  
faults:

Specific criticisms of county government fall into four main groups, according as they relate to (1) excessive uniformity; (2)

<sup>1</sup> See H. A. Barth, "County Government in the Southwest" [Oklahoma], *Nat. Mun. Rev.*, XIV, 140-144 (Mar., 1925); M. L. Requa, "The Government of Alameda County, California," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 237-247 (May, 1913); A. E. Smith, "New York County Government Archaic," *Nat. Mun. Rev.*, XV, 399-402 (July, 1926); J. E. Pate, "Recent Proposals for Reorganizing County Government in Virginia," *Amer. Polit. Sci. Rev.*, XXIII, 131-138 (Feb., 1929); A. W. Bromage, "The Crisis in County Government in Michigan," *ibid.*, XXV, 135-145 (Feb., 1931).

the county board; (3) other county officers; and (4) miscellaneous phases of administration.

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1. Excessive uniformity

With the exception of a few very populous counties, all the counties in a state have the same form of government. This means that small and sparsely settled counties are compelled to maintain a needlessly elaborate and cumbersome governmental organization, whose cost is out of all proportion to the service it renders. Two or more such counties might well be consolidated, so as to save a large part of their annual expenditures; yet county consolidation is difficult to bring about, and is a rare event.<sup>1</sup> A possible alternative is the classification of counties, with a view to a uniform scheme of government only for those counties belonging to the same class. Counties are, indeed, now classified in Illinois, Pennsylvania, and some other states for state administrative or legislative purposes, but not for governmental organization.

Remedies

Another alternative would be to institute a system of optional county charters, analogous to the optional city-charter system,<sup>2</sup> thereby enabling each county to adopt, by popular referendum, any one of several standard schemes of county government.<sup>3</sup> Still another possibility takes the form of county home-rule charters. Under this plan, the voters of a county elect a charter commission to draft a county charter, subject to the state constitution and statutes, and to the approval of the voters. This plan is analogous to the well-developed municipal home-rule charter system.<sup>4</sup> It, however, has gained comparatively slight headway, only two states having adopted it—California, by constitutional amendment, in 1911, and Maryland, in a similar way, in 1915. Five California counties—Los Angeles<sup>5</sup> and San Bernardino (1913), Butte and Tehama (1917), and Alameda (1926)<sup>6</sup>—have framed home-rule

<sup>1</sup> Such consolidation in New York was urged by Governor Smith. See J. C. Young, "Governor Smith's Plan for a Modern State," *N. Y. Times*, Mar. 11, 1928. Cf. J. W. Manning, "County Consolidation in Tennessee," *Nat. Mun. Rev.*, XVII, 511-514 (Sept., 1928), and *Amer. Polit. Sci. Rev.*, XXII, 733-735 (Aug., 1928); "County Consolidation," *Transactions Common. Club of Cal.*, XXIV, 141-187 (June, 1929).

<sup>2</sup> See p. 919 below.

<sup>3</sup> The new constitution adopted in Louisiana in 1921 authorizes optional forms of parochial (county) governments (Art. XIV, § 3). Virginia, in 1928, adopted a constitutional amendment empowering the legislature to provide optional forms of county government.

<sup>4</sup> See pp. 917-919 below.

<sup>5</sup> For the Los Angeles county charter, see H. S. Gilbertson, *The County*, 219 ff.; summarized in L. R. Works, "The Los Angeles County Charter," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 229-236 (May, 1913).

<sup>6</sup> P. M. Cuncannon, "The New Charter of Alameda County, California," *Amer. Polit. Sci. Rev.*, XXIII, 124-130 (Feb., 1929).

charters under which their organization has been considerably simplified and unified, although constitutional obstacles have prevented radical changes.<sup>1</sup>

The county boards of supervisors in some states, especially New York, Illinois, and Michigan, are too large. The large board has in the past been supported on the theory that it is the legislative branch of county government, and therefore should be representative of all important subdivisions of the county. In point of fact, however, the board has, except in Michigan, practically no legislative power beyond the right to levy taxes and make appropriations; the remainder of its work consists almost entirely of administration.

Too large

The objections to a large board are several. In the first place, such a body, made up of members from all parts of the county, can meet only at comparatively infrequent intervals, and so is not in continuous touch with what is going on in the various county offices and institutions, although the running of a county is a complex administrative problem, requiring constant and active supervision. A large board rarely can act with a proper degree of promptness. In the second place, a large board is unwieldy as an administrative body, and is therefore obliged to leave much to be done by virtually irresponsible committees.<sup>2</sup> These are usually appointed by the chairman of the board, and not infrequently are made up on a strictly partisan basis, with the chairmen appointed under a seniority rule which often leaves the best qualified men in positions of little or no influence. These committees look after various branches of the county administration and make their reports and recommendations to the full board, which generally accepts and approves the action of a committee in the most perfunctory manner. If the board as a whole attempts to consider in detail any phase of county work, it soon degenerates into a debating society. In the third place, no executive head is charged

<sup>1</sup> Important steps in the direction of county home rule were taken in New York in 1921 and 1929, when constitutional amendments were adopted empowering the legislature to provide for new forms of government for Westchester and Nassau counties, subject to the approval of the voters in each county. See W. A. Bassett, "Westchester County Government Act," *Amer. City*, XIV, 119-120 (Feb., 1925). Home-rule charters have twice been rejected by the voters of Westchester county. See L. A. Tanzer, "The Defeat of the Westchester County Charter," *Nat. Mun. Rev.*, XVII, 9-11 (Jan., 1928); P. M. Cuncannon, "The Proposed Charters for Westchester County, New York," *Amer. Polit. Sci. Rev.*, XXII, 130-139 (Feb., 1928).

<sup>2</sup> In ten Illinois counties, the number of committees runs from thirteen to twenty-six.



with the duty of supervising and correlating the work of these committees and keeping the board informed on the needs and transactions of the various county offices; for, aside from his right to make committee assignments, the chairman of the board, with but few exceptions, has no more power than other members. Lastly, individual members of the board of supervisors are selected primarily to serve as township officers; they are county officials only secondarily. Hence there is every incentive to serve their township first; as a result, log-rolling and other evils characteristic of the ward system of selecting city councilmen abound in county government.

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One prerequisite, therefore, of more efficient county government is the abolition of the large board of supervisors and the substitution of a small body of from three to seven members, elected either at large or from very few districts. If made alone, however, this change might not result in any conspicuous improvement; a considerable enlargement of the board's powers is also desirable. In one particular after another, county boards throughout the country have had their discretionary powers taken away by mandatory statutes imposing specific duties upon them. Yet they are capable of being made to serve very useful purposes in our system of government, performing for the rural portions of the state many of the functions which city governments perform for urban populations, but which are beyond the resources of most towns and villages. The boards' legislative powers, therefore, might well be increased. A much larger degree of home rule in matters that do not transcend county boundaries would relieve the state authorities of many burdensome duties which at present are often performed very indifferently. Michigan, California, and Maryland are practically the only states in which any noteworthy beginnings have been made in this direction. Thus, the Michigan constitution and statutes have given county boards full power "to pass such laws, regulations, and ordinances, relating to purely county affairs, as they see fit, but which shall not interfere with the local affairs" of any township, city, or village within the county. County legislation of this sort must be submitted to the governor, and may be vetoed by him; but the board can override a veto by a two-thirds vote.

Powers  
too re-  
stricted

On the administrative side, too, the boards' powers could advantageously be enlarged, especially its appointing power and supervisory and controlling authority over other county officials

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and employees. Over the latter, the county board now has very slight power, either of control or of supervision. Such power as it does have usually takes the form of approving bonds required of newly elected officials, examining the accounts of certain officers, fixing salaries, removing the county treasurer, hearing complaints against officers, and removing them if misconduct is proved. But, in the main, the board has little real control over the county administration: it can seldom demand information in writing from any official concerning the affairs of his office, and its authority to vote salaries and appropriations is rarely employed as a means of effective control.

3. Undesirable multiplicity of elective offices

With respect to the other county officers, it has been repeatedly pointed out that too many of them are elective, thus lengthening the ballot and tending to confuse the voter on election day. Perhaps it would be more correct to say that the voter, instead of being confused, merely votes blindly for the county ticket of one party or another. Few, if any, of these elective county offices have any political significance; that is, they possess little or no power to determine what the county government shall do. They are almost wholly administrative, and the duties of their incumbents are more or less minutely set forth in the state laws; all that these persons have to do is to find out the law relating to their particular office, and to execute it in the manner prescribed. Such offices, by their very nature, ought to be filled by appointment. So long as they remain elective, most county officials will probably continue to be chosen on a partisan basis, presumptively with reference to their views on national questions, which have about as much relation to county problems as their views on evolution or the nebular hypothesis. As a matter of fact, there is no Republican or Democratic way of performing the duties of county treasurer, or sheriff, or prosecuting attorney, or county clerk. In California and North Dakota, and in Milwaukee county, Wisconsin, all county officials are nominated and elected on a non-partisan ballot. Unless, however, the number of elective county officers is greatly reduced, the benefits to be derived from non-partisan elections are likely to be disappointing.

Proposed arrangements for appointment

To be specific, there should be a small elective county board, with greatly enlarged powers of legislation, appointment, and removal, and chosen on a non-partisan ballot if local conditions hold out any real prospect of genuine non-partisan choice. All other county officers, with the possible exception of the auditor or

[illegible]

This is the diagram of a typical county—absolutely headless; a long string of elective officers; lines of responsibility cross at dozens of points; duplication of functions at every turn; a veritable jungle.

Courtesy of the Milwaukee City Club

comptroller, should be made appointive. The coroner, in particular, should cease to be an elective official. The modern history of that ancient office is indeed "a story of political degeneracy."<sup>1</sup> The example of the New England states, New Jersey, and New York City in substituting for the coroner an appointive medical examiner, trained in medico-legal jurisprudence and acting in close coöperation with the prosecuting attorney, should be widely followed.<sup>2</sup> Better results at less cost might also follow the general transfer of coroners' duties to the prosecuting attorney, as has taken place in Jefferson county, New York.<sup>3</sup>

If these county officers ceased to be elective, where should the appointing power be lodged? The answer is that it should be distributed according to the nature of the work to be performed. First of all, the state should not only appoint but pay all so-called county officers whose chief, if not only, duty is to enforce state laws for the suppression and punishment of vice and crime, precisely as the national government appoints and pays the corresponding national officials, *i.e.*, the United States marshals, commissioners, district attorneys, and district judges. The work of the sheriff, prosecuting attorney, and county judge is really not county work at all, except geographically; in nature, it is state work. Although elected by the people of the county, these officers serve the people of the state as a whole. Their appointment, compensation, and removal by the state would tend to prevent much of the local nullification of state laws which is now so common, and would throw upon the state legislature the burden of facing any public hostility to unpopular laws. The sheriff should be appointed and made removable by the governor; the prosecuting attorney, either by the governor or by the attorney-general of the state, preferably the latter.<sup>4</sup> On the other hand, clerks of courts should be appointed by the courts which they serve; and county treasurers and collectors, assessors, superintendents of schools,<sup>5</sup> and all other purely

<sup>1</sup> H. S. Gilbertson, "The Coroner; a Story of Political Degeneracy," *Rev. of Revs.*, LI, 334-337 (Mar., 1915).

<sup>2</sup> A. O. Gettler, "Why the Coroner System Has Broken Down," *Nat. Mun. Rev.*, XIII, 560-567 (Oct., 1924); C. Morris, "The Medical Examiner versus the Coroner" [in New York City], *ibid.*, IX, 498-504 (Aug., 1920).

<sup>3</sup> The coroner system in New York is discussed critically in *Report of the Special Joint Committee on Taxation and Retrenchment* (1923), 51-55.

<sup>4</sup> W. E. Binkley, "The Prosecuting Attorney in Ohio—An Obsolete Officer," *Nat. Mun. Rev.*, XVIII, 569-573 (Sept., 1929).

<sup>5</sup> Iowa, in 1913, provided for the election of the county superintendent of schools for a three-year term by a convention consisting of the presidents of all of the local school boards of the county, a three-fourths vote being required to elect.

county officials should be appointed, directly or indirectly, and made removable, by the county board. At the same time, all subordinates and county employees should be selected, promoted, and dismissed in accordance with carefully drawn civil service regulations. In a word, the officers having state functions should be appointed and controlled by the state; and the real county officers should be put under the full control of the county board, which would thus become, in a larger measure, the head of the county government. For the first time, responsibility for the administration of county affairs would be properly placed and unified.

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But the reform should not stop here. There ought to be some effective apex to the county organization, as in the case of the city, state, and nation. This can best be supplied by a single executive officer empowered to check waste, correct abuses, institute needed changes or reforms, enforce a proper degree of harmony, cooperation, and subordination, and furnish the essential element of leadership. County boards might profitably follow the example of some four hundred cities by appointing a manager and delegating to him the supervision of the details of county administration, including full control over subordinate county officials through the power of appointment and removal, subject to proper civil service regulations. The elective county board would then serve as the representative legislative, or policy-determining, body; and its chief functions would be to select a competent county-manager, pass upon the annual budget and tax levy, and enact such local ordinances as might be needed. Commission-manager county government might also properly include such incidents of commission-manager city government as the recall and the initiative and referendum.<sup>1</sup> Nothing short of some such wholesale reorganization

Need of  
a real  
county  
executive,  
or manager

<sup>1</sup> See p. 937 below. Arlington county, Virginia, adopted the county-manager form of government in November, 1930 (*Nat. Mun. Rev.*, XX, 127-131, Mar., 1931). County-manager charters have been proposed and rejected by the voters in Baltimore (1920), Sacramento (1922), and San Diego (1917, 1923). See *Nat. Mun. Rev.*, IX, 504-513 (Aug., 1920); *ibid.*, XI, 309-310 (Oct., 1922); *ibid.*, XII, 264-265 (May, 1923); and *ibid.*, XII, 345-346 (July, 1923). The new county charters proposed for Nassau and Westchester counties provided for an elected county president with powers similar to those of a city manager. See references on p. 896, n. 1. The Georgia legislature, in 1922, authorized the adoption of the county manager plan after a popular vote. The North Carolina legislature, in 1927, authorized the counties of that state to choose between the form of government then existing and the county-manager plan. *Nat. Mun. Rev.*, XV, 730-731 (Dec., 1926); *ibid.*, XVI, 218-219 (Apr., 1927); P. W. Wager, "North Carolina to Have Better County Government," *ibid.*, 519-526 (Aug., 1927); "Improving County Government in North Carolina," *ibid.*, XVIII, 8-15 (Jan., 1929); "Signs of Progress in County Government," *ibid.*, XIX, 541-549 (Aug., 1930).

will so simplify and unify our present "ramshackle county government" as to make it easily understood by the average citizen. Elective county officials must come to be so few in number, and so important and conspicuous, that the average voter can mark his ballot intelligently and know who is to blame when things go wrong.

That things frequently go wrong in county administration, no one will deny. County institutions are often very indifferently managed. Jails, poor-relief, and other charitable and welfare activities show urgent need of consolidation under a department with an expert at its head. "The American county jail," says an eminent penologist,<sup>1</sup> "is recognized the world over as the peculiar disgrace of our system of criminal justice;" another authority characterizes the county jail as "the worst institution that exists in America—a school in which the uninitiated are trained in vice, immorality and crime;"<sup>2</sup> while a former federal inspector of prisons declares that "a debauch of dirt, disease, and degeneracy" fitly describes eighty-five per cent of the jails throughout the country.<sup>3</sup> Our county poorhouses have been characterized by a competent investigator as "the worst managed public business in the world," "a disgrace to the states," and a menace to the health and morals of the community.<sup>4</sup>

Inefficiency and needlessly expensive methods prevail widely in the transaction of county business generally and the handling of county finances in particular. In the more populous counties, one often finds an excessive number of employees on the county pay-roll, owing to spoils considerations.<sup>5</sup> All too frequently, there

<sup>1</sup> George W. Kirchwey, formerly dean of Columbia University Law School.

<sup>2</sup> Amos W. Butler, secretary of the Indiana state board of charities.

<sup>3</sup> J. F. Fishman, *Crucibles of Crime* (New York, 1923). See also S. A. Queen, *The Passing of the County Jail* (Menasha, Wis., 1920); E. Abbott, *The One Hundred and One County Jails in Illinois* (pamphlet, Chicago, 1916); Chicago Community Trust, *Reports Comprising the Survey of the Cook County Jail* (Chicago, 1922); C. P. McCord, "A Survey of the Albany County (N. Y.) Jail and Penitentiary from Social, Physical, and Psychiatric Viewpoints," *Jour. Crim. Law and Criminol.*, XV, 42-67 (May, 1924); R. D. Wheeler, "The Problem of the County Jail," *ibid.*, XV, 620-630 (Feb., 1925); "Justice and the Jail," by an inmate, *Outlook*, XCII, 551-554 (July 3, 1909); *Literary Digest*, CI, Apr. 27, 1929, pp. 26-27, "Our Jails as Schools of Crime."

<sup>4</sup> "A Move to Abolish the Poorhouse," *Literary Digest*, XC, Sept. 4, 1926, pp. 10-11; E. M. Stewart, "The Cost of American Almshouses," *U. S. Depart. of Labor Bull.*, No. 386 (June, 1925).

<sup>5</sup> The introduction of labor-saving mechanical devices in some of the county offices in Cook county, Illinois, in 1924, made possible a reduction of fifty per cent (\$590,000) in the appropriations for extra employees and overtime salaries.

is nothing worthy of the name of a budgetary system;<sup>1</sup> illegal expenditures, made in either ignorance or disregard of the law, are not at all uncommon; shortages were discovered not long ago in the accounts of twenty-five out of the sixty-one counties in New York. Often there is lacking anything which an ordinary business man would recognize as an accounting system; and when there is something of the kind, it is seldom uniform for all of the county offices. In Illinois, and probably most other states, some counties do not even keep a full record of the financial transactions of county officers. Waste and extravagance often characterize the granting of salaries or other forms of compensation by county boards and the purchase of county supplies. When a county board authorizes payment of \$108,000 for advertising the sale of lots of land for unpaid taxes amounting to \$34,000, or the payment of over \$13,000 incidental to the acquisition of \$21,000 worth of real estate, as has actually happened, the tax-payers may well feel indignant, even though they are not likely to be able to fix the responsibility.<sup>2</sup>

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The pocket-book nerve is the most sensitive part of the average tax-payer's anatomy, and so it is not surprising to find that important steps have been taken to remedy loose financial methods. In Indiana, a specially elected county council has taken over both the taxing and appropriating powers of the county board.<sup>3</sup> In Iowa, Minnesota, Massachusetts, New York, Ohio, and other states, provision has been made by law for state supervision, audit, or inspection of county financial transactions. In New York, for example, the state comptroller has authority to send examiners to any county to investigate and report upon its financial condition.

Financial  
reforms

<sup>1</sup> J. A. Fairlie and C. M. Kneier, *County Government and Administration*, Chap. XIX; O. G. Cartwright, "County Budgets and Their Construction," *Annals Amer. Acad. Polit. and Soc. Sci.*, LXII, 223-234 (Nov., 1915).

<sup>2</sup> For illustrations of lax county financial methods in New York, see *Proceedings of the First Conference for Better County Government in New York State* (1914), 12-16, 29-46; *Proceedings of the Second Conference for Better County Government in New York State* (1916), 60-67; *Proceedings of the Conference for the Study and Reform of County Government* (3rd meeting, February 20, 1914), 10-17; in Michigan, see *Nat. Mun. Rev.*, IX, 696-698 (Nov., 1920); in Cuyahoga county, Ohio, *ibid.*, XIII, 387-388 (July, 1924); in Allegheny county, Pennsylvania, M. L. Faust, "County Deposits to Finance Speculative Bank," *Nat. Mun. Rev.*, XV, 14-20 (Jan., 1926). See also K. H. Porter, *County and Township Government in the United States*, Chap. XI.

<sup>3</sup> More recently, the Indiana state tax commission has been empowered to revise county tax levies and to approve or disapprove proposed bond issues. See *Nat. Mun. Rev.*, XIV, 64, 90-95 (Feb., 1925); *ibid.*, XIV, 188-189 (Mar., 1925); F. G. Bates, "State Control of Local Finance in Indiana," *Amer. Polit. Sci. Rev.*, XX, 352-360 (May, 1926).

Out of fifty-seven counties visited by such examiners a few years ago, only four were found to have accounting methods worthy of favorable comment; and in not a single instance had there been compliance with every provision of state law relating to local financial transactions. New York, Iowa, Nebraska, and a few other states now prescribe uniform systems of accounting for all counties;<sup>1</sup> North Carolina and California require counties to follow a uniform budget system;<sup>2</sup> and about half of the states provide for periodical financial reports from local authorities to some state official, although, obviously, mere reports are of but limited advantage. In not a few instances, state supervision has resulted in noteworthy improvement; but much more might be accomplished if legislative appropriations for inspectorial work were more adequate.

City and  
county

Another serious and costly administrative defect in counties containing large cities is the existence of two sets of officers, county and municipal, who perform the same kinds of services for practically the same people. Perhaps the most striking illustration of this duplication is to be found in the case of Chicago and Cook county. Within the city limits of Chicago reside more than nine-tenths of the people of Cook county, and from them comes about the same proportion of the county taxes; nevertheless, more than a dozen different activities are substantially duplicated. No useful public purpose is served by such an arrangement; the cost of government is greatly augmented;<sup>3</sup> and the lengthened ballot im-

<sup>1</sup> A. J. Peel, "Some Problems of County Government Accounting," *Amer. City*, XXX, 605-607 (June, 1924).

<sup>2</sup> *Nat. Mun. Rev.*, XVI, 428-429 (July, 1927).

<sup>3</sup> In 1917, it was estimated that the unification of the various governments in Cook county would result in an annual saving to the tax-payers of not less than \$3,200,000. On the Chicago-Cook-county situation, see Chicago Bureau of Public Efficiency, *Unification of Local Governments in Chicago* (1917); *Illinois Const. Con. Bull.* No. 11, "Local Government in Chicago and Cook County" (1920).

On the situation in other urban counties, see *Ill. Const. Conv. Bull.* No. 11, pp. 995-980 (1920); C. C. Maxey, "The Political Integration of Metropolitan Communities," *Nat. Mun. Rev.*, XI, 229-253 (Aug., 1922); T. H. Reed, "Municipal Developments in the United States and Canada," *Amer. Polit. Sci. Rev.*, XXI, 360-365 (May, 1927); Boston, *Annals Amer. Acad. Polit. and Soc. Sci.*, XLVII, 134-152 (May, 1913); *Amer. Polit. Sci. Rev.*, XXIV, 140-143 (Feb., 1930); *Amer. Polit. Sci. Assoc. Proceedings*, VIII, 61-72 (1911); New York City, *ibid.*, VIII, 73-78 (1911); St. Louis, *ibid.*, VIII, 97-108 (1911); *Nat. Mun. Rev.*, XIII, 605-608 (Nov., 1924); *ibid.*, XIX, 405-410 (June, 1930); XX, 12-15 (Jan., 1931); Philadelphia, Bureau of Municipal Research, *Philadelphia's Government* (pamphlet, 1924); Cleveland, *Nat. Mun. Rev.*, XVIII, 464-470 (July, 1929); Detroit, *Public Business*, III, Nos. 2, 11 (1923-24); St. Paul, *Nat. Mun. Rev.*, XIII, 425-430 (Aug., 1924); Butte, *ibid.*, XII, 310-317 (June, 1923); Seattle, *ibid.*, XII, 691-692 (Nov., 1923); San Francisco, *Amer. Pol. Sci. Assoc. Proceedings*, VIII, 109-121 (1911); *Nat. Mun.*



poses an unnecessary burden upon the voters. The proper remedy in such a case seems to be to place the city outside of the jurisdiction of the county officers, transferring the functions of the latter to the appropriate city departments, and to retain the county government solely for the rural or semi-urban portions of the county.<sup>1</sup> Important steps in this direction have been taken in St. Louis, Denver, San Francisco, and to a less extent in Boston, New York, and Philadelphia.

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Reorganization of county government and reform of the methods of transacting county business will not proceed far in most states before the discovery is made that the county cannot be treated as an isolated unit. Its relations to the townships, the school districts, the villages, and the cities within its limits must be freshly worked out in the most careful and painstaking way, and in some states will require extensive readjustment. Such changes ought to be preceded by an expert county survey, similar to the municipal surveys that have preceded the reorganization of many city governments. The survey should cover the relations of the county to the state authorities, on the one hand, and to the various political subdivisions of the county, on the other; the levy and collection of taxes, the equalization of property valuations, auditing control and accounting methods, bonded indebtedness, and purchasing methods; the registration of instruments for the transfer of property, and the care and custody of the records of such transactions; and the proper respective spheres of state, county, and local officials. These and many other matters of similar character will have to be gone into in a systematic manner, with the possible result that changes will have to be made in cities, townships, and villages if county reorganization is to be carried through successfully.

County  
surveys

Even if the people were fully aware of the need for the changes outlined—which they are not—they are, by themselves, not in a position to effect any thoroughgoing renovation. Nevertheless, they might accomplish something. An aroused public opinion might compel the county board to adopt a sort of self-denying ordinance

*Rev.*, XIII, 617-620 (Nov., 1924); Alameda county (Cal.), *ibid.*, XI, 204-211 (July, 1922); Los Angeles, *ibid.*, X, 7-9 (Jan., 1921); *ibid.*, VII, 163-166 (Mar., 1918); Portland, Ore., *ibid.*, XIV, 36-41 (Jan., 1925); *ibid.*, XVI, 293-295 (May, 1927); Pittsburgh, *ibid.*, XV, 518-522 (Sept., 1926); *Amer. Polit. Sci. Rev.*, XXI, 365-369 (May, 1927); *ibid.*, XXIII, 121-123 (Feb., 1929); *ibid.*, 718-726 (Aug., 1929); *Nat. Mun. Rev.*, XVIII, 529-532 (Aug., 1929); *ibid.*, 603-609 (Oct., 1929).

<sup>1</sup> Virginia counties have no jurisdiction over cities within their boundaries; city officials perform the usual county functions. Cf. J. A. Fairlie and C. M. Kneier, *op. cit.*, Chap. xxiv.



and graft the managership upon the existing government, as a number of cities and villages have done, without waiting for special authorization from the legislature. A progressive county board might also, without waiting for legislative action, authorize an expert survey of county government and administration similar to that recently made in Delaware under the auspices of the New York Bureau of Municipal Research.<sup>1</sup> Capable and progressive county officers can likewise, on their own initiative, introduce more business-like methods of handling the work of their respective offices. Sooner or later, however, the county board, or the other county officials, will confront the necessity of appealing to the legislature for assistance.

It would, indeed, be highly creditable to the legislature not to wait for such appeals, but to take the initiative; for it can do far more than the unaided county authorities in promoting better county government and administration. Probably no legislature is without the power to provide for an expert survey of county government, either throughout the state or in some typical counties; to authorize the employment of county managers or purchasing agents by county boards; to abolish or revise the fee system which still adheres to many county offices; to require a uniform accounting system, periodical financial reports in prescribed forms, and modern budgetary methods; and to introduce some measure of reform in the assessment and collection of taxes. Furthermore, every legislature could order a codification of all existing laws relating to the duties of the various county and local officers, to be accompanied by a handbook or manual for ready reference, thereby relieving unskilled officials of the burden of threading their way through the labyrinth of compiled statutes and confusing session laws in a more or less futile effort to find out what their duties and limitations are—a task which is not always performed satisfactorily even by the most conscientious. The legislature might also enact a civil service law for the elimination of the spoils system in connection with the subordinate positions on the county pay-roll, abolish any county offices created by statute and transfer their

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Reform  
through  
the legis-  
lature

<sup>1</sup> The results of the Delaware survey are set forth in C. C. Maxey, *County Administration* (New York, 1919). For a similar study of county government in North Carolina, see E. C. Branson *et al.*, *County Government and County Affairs in North Carolina* (Chapel Hill, 1919). In 1925, the governor of North Carolina, at the request of the State Association of County Commissioners, appointed a commission on county government. The commission's report is summarized in *Nat. Mun. Rev.*, XV, 730-731 (Dec., 1926). Cf. L. D. Upson [ed.], *The Government of Cincinnati and Hamilton County* (Cincinnati, 1924).

duties, and convert statutory elective offices into appointive offices, thereby hastening the advent of the short ballot and facilitating intelligent voting.

In most states, however, "the roots of county government are imbedded in the legal granite of the state constitution and can be removed only by blasting them out with a constitutional amendment." Even the most intelligent and sympathetic legislature is thus limited in what it may do to promote better county government. Not only is it restrained from shortening the ballot, by constitutional provisions making various offices elective, but it is hampered by provisions which impose a uniform type of government upon all counties, limit the amount and incidence of county taxation, restrict the amount of bonded indebtedness, and require the unnecessary and costly duplication of county and city offices. Nothing less, therefore, than a series of constitutional amendments will clear the way for that simplification and unification of county organization which is essential to truly democratic local government. Reform proposals on such extensive lines, however, especially if they involve even temporary inconvenience to party managers, are likely to encounter strenuous opposition; for the county is commonly the most important unit of party organization, and county government the chief base of party supplies in local political contests.<sup>1</sup>

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<sup>1</sup> A. R. Hatton, in *Nat. Mun. Rev.*, XII, 311 (June, 1923).

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## CHAPTER XLI

### THE CITY AND ITS CHARTER

Growth  
of urban  
popula-  
tions

"City government," remarks a recent writer, "touches more people at more points and more frequently than any other branch of government." The number of people so affected increases in the United States with remarkable rapidity. In 1800, there were only six cities in the country, and their combined population was a little less than four per cent of the total;<sup>1</sup> in 1890, there were 444 cities, comprising thirty per cent of the aggregate population. In other words, while the population of the country as a whole increased only twelvefold, the urban population increased eighty-sevenfold, in less than a century. By 1900 a little more than forty per cent, by 1910 more than forty-six per cent, and in 1920 over fifty-one per cent of the country's population was reported in the census statistics as living in incorporated places of 2,500 inhabitants or more. By 1930, the proportion of urban population had risen to 56.2 per cent. The census of that year showed that nearly a tenth of our total population was to be found in the three cities of New York, Chicago, and Detroit; and that the number of cities with more than 100,000 population had risen from sixty-eight in 1920 to ninety-three.<sup>2</sup>

This impressive increase of urban population is of concern, not only to city dwellers themselves, but to rural dwellers as well; many of the conditions and problems which directly affect city folk indirectly affect the welfare of non-urban populations. It is, for example, a matter of more than local municipal concern if an

<sup>1</sup> Excellent brief histories of American city government will be found in W. B. Munro, *The Government of American Cities* (4th ed., New York, 1926), Chap. II, and A. F. Macdonald, *American City Government and Administration*, Chap. III. A more extended account is to be found in T. H. Reed, *Municipal Government in the United States* (New York, 1926), Chaps. IV-VII.

<sup>2</sup> Until 1900, incorporated places having 8,000 inhabitants, and from 1900 to 1920, inclusive, incorporated places having 2,500 inhabitants, were classed as urban communities by the census authorities. For purposes of the 1930 census, the definition was extended to include townships and other similar political subdivisions (not incorporated as municipalities) that had a total population of 10,000 and a population density of 1,000 or more per square mile. *U. S. Daily*, Dec. 23, 1930, pp. 3225 ff.

epidemic breaks out in a large city, or if a city seeks to dispose of its sewage in a stream from which the people along its course draw their water supply, or if the criminal laws are poorly enforced by city authorities, or if city primaries and elections are disorderly and dishonest, or if the financial transactions of a city are characterized by waste and extravagance. No city, indeed—especially if it be one of considerable size—can live unto itself; the welfare, prosperity, and prestige of the cities of a state contribute enormously and in manifold ways to the welfare, prosperity, and prestige of the state as a whole.

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Furthermore, in the organization of their government, and in carrying on various municipal activities, cities frequently find themselves handicapped by provisions in the state constitution or statutes, or by the peculiar legal status of cities in our political system; and under such circumstances it becomes incumbent upon the people of the state at large, through a constitutional convention, or the state legislature, or the state administrative departments, to deal with important municipal questions. Coöperation and mutual interest ought, therefore, always to characterize the political relations of the urban and rural sections of a state, although much too frequently these relations are marred by suspicion, jealousy, and more or less open antagonism. In addition, it should be noted that the coöperation of even the national government not infrequently becomes necessary to the successful promotion of some important municipal undertaking, or to the solution of some of the serious social problems arising in our great urban centers, such as sanitation, water supply, protection against contagious diseases, the high cost of living, poverty, overcrowding, housing, unemployment, low standards of life, physical degeneracy, and the naturalization and Americanization of alien immigrants. Truly, we are "every one members one of another."

A city is a municipal corporation possessing the power to sue and be sued, to acquire, hold, and dispose of property, to enact ordinances, to raise money by taxation, and to exercise the right of eminent domain.<sup>1</sup> Every city has a fundamental law, called the charter, which defines the city's powers, outlines its organs of government, determines the method of choosing the mayor, council, and other officials, assigns to some or all officials their respective duties, and determines with varying degrees of precision the re-

Legal  
status of  
cities

The city  
charter

<sup>1</sup> Cf. H. L. McBain, "The Legal Status of the American Colonial City," *Polit. Sci. Quar.*, XL, 177-200 (June, 1925).

lations of these officials to one another. Some charters deal with these matters in very general terms, leaving to the city large discretion in arranging details by ordinances. But most charters specify with great minuteness everything that a city may do, and have become, like state constitutions, lengthy and complicated documents; the charter of Greater New York fills more than fourteen hundred printed pages.<sup>1</sup>

Whatever its form and content, a city charter, or the authority to frame one, comes from the state legislature; and since charters differ in no essential respect from other acts of the legislature, that body has the right to grant, withhold, suspend, alter, or revoke a charter at its pleasure, even in defiance of the expressed wishes of the people of the city affected. This form of legal autocracy is, however, tempered more or less by considerations of political expediency, and also by such restrictions upon the power of the legislature as may be found in the national or state constitution. Nevertheless, it should always be borne in mind that, legally, the city, as a municipal corporation, is merely the creature of the state legislature, exercising certain delegated governmental functions, and that it is therefore absolutely under legislative control except in so far as it is protected by the constitutional restrictions mentioned below.<sup>2</sup>

In conferring powers on cities, legislatures have usually been parsimonious rather than prodigal; and this practice, taken with the fact that until recently the courts have been prone to construe charter provisions strictly and narrowly, has in many cases set up serious impediments to proper municipal development. Most cities are compelled to be more or less constant suppliants at the bar of the legislature for additional grants of authority for purposes not clearly covered by the provisions of their charters. The result is a serious encroachment upon the time and energy of the legislature which are needed for the consideration of matters of general, state-wide concern. How serious this encroachment is may be gathered from the fact that in New York between 1910 and 1915, out of a total of 4,260 bills passed by the legislature, 983 were special city bills; while in Massachusetts, from 1885 to 1908,

<sup>1</sup> Extracts from numerous charters will be found in T. H. Reed and P. Webbink, *Documents Illustrative of American Municipal Government* (New York, 1926).

<sup>2</sup> Cf. H. L. McBain, "The Rights of Municipal Corporations under the Contract Clause of the Federal Constitution," *Nat. Mun. Rev.*, III, 284-303 (Apr., 1914).



the legislature passed no fewer than four hundred special laws relating to the city of Boston alone.<sup>1</sup>

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On the other hand, many legislatures have been guilty of unjustifiable acts of aggression upon the domestic affairs of a city. Possessing virtually absolute power over rapidly growing cities, legislatures, early in our history, began to yield to the temptation to abuse their power by interfering in the internal politics and administration of one city after another in a great variety of ways. In some instances, such interference has been beneficial to the city or cities affected, and, for a time at least, has been welcomed by the better class of citizens. But whether or not it has beneficent results, the principle is the same; it constitutes an infringement of the theory of home rule in municipal affairs, and is rarely if ever long accepted with entire complacency.

Dislike of such interference has found expression since about 1850 in practically all of the state constitutions. Most frequently, remedy has been sought in a clause forbidding the legislature to pass "special acts," *i.e.*, measures affecting a single city rather than all cities of the state, or, at all events, less than all cities of a specified class. In some instances, such special legislation has been permitted to continue, but local interests have been safeguarded by giving the city a veto upon it, either through a popular referendum, as in Chicago, or by the action of the mayor and council, as in the cities of New York. Another mode of restriction which has often been resorted to, especially in recent decades, has to do with the way in which city charters are made. Speaking broadly, five successive methods have been employed, namely: (1) the special charter system, (2) the general charter system, (3) the classification method, (4) the home-rule charter system, and (5) the optional charter plan. These methods are not mutually exclusive; sometimes two are found concurrently in the same state. Thus, New York long had only the classification system, but her constitution and statutes now sanction the home rule and optional charter plans. Obviously, the basis and character of city government depend largely on who makes the charter and what is put into it. Hence these rival systems call for a word of comment.

Charter  
systems:

Where the special charter system prevails, as it still does in Massachusetts and some other older states, each city has a charter,

1. Special  
charter  
system

<sup>1</sup> See *Amer. Polit. Sci. Rev.*, XI, 534-535 (Aug., 1917); *Nat. Mun. Rev.*, I, 182-194 (Apr., 1912); II, 597-604 (Oct., 1913); XIII, 45-46 (Jan., 1924); *Mun. Affairs*, VI, 198-211 (June, 1902).

granted to it by special act of the legislature; and there may be as many different varieties of charters as there are cities. The chief merit of this plan is that it enables each city to obtain, if the legislature is willing, the form of government and the corporate powers best suited to its size and general needs. In other words, the system permits adaptation to varying local conditions. On the other hand, it is inherently defective in that the legislature is given practically a free hand to interfere in municipal affairs by creating or abolishing offices at the behest of local political factions or machines, or by transferring duties from elective to appointive officials, or vice versa.<sup>1</sup>

The general charter system came as a reaction against the legislative abuses which have characterized the granting of special charters. For the diversity provided for in the special charter plan, the general charter method substitutes uniformity; a state-wide municipal code constitutes the charter for each individual city; and all cities presumably have the same form of government and the same corporate powers. This plan has the obvious merit of simplicity, and it largely removes from the legislature the temptation to tinker with local government machinery. Nevertheless, even the most perfect municipal code will need amendment from time to time; and experience shows that one city or another will be constantly finding some change essential to its welfare. Hence the system does not, in practice, do away with special legislation or with sheer legislative meddling in local affairs, although this was its original purpose. It has, furthermore, some inherent defects, chiefly an excess of uniformity. If a state contains cities varying greatly in size, as often happens, or if some of the municipalities are inland and others are on the coast or on an important waterway, it is difficult, if not impossible, to frame a general code which will satisfactorily meet the needs all around. A form of government and a body of powers adapted to a large commercial city like Cleveland will be almost certain to prove a serious misfit for the great majority of cities in the state which are much smaller and have entirely different problems. Conversely, if the code is

<sup>1</sup> For Pennsylvania and Ohio examples of this sort of "ripper" legislation, as it is commonly called, see *Mun. Affairs*, VI, 212-219, 234-244 (June, 1902). More recent illustrations are afforded by the action of the New Hampshire legislature of 1921 in transferring the administration of police, streets, highways, and sewers from the city authorities in Manchester to commissions appointed by the governor, and giving to a state commission the right to veto the whole or a part of any appropriations voted by the city government. *Nat. Mun. Rev.*, X, 310-311 (June, 1921).

drawn primarily with reference to the needs of these smaller places, it is likely to prove a strait-jacket for the metropolis of the state.<sup>1</sup>

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Probably the most satisfactory general state law designed to apply to all cities is the Illinois cities and villages act of 1872. Until 1904, practically all cities in that state, including Chicago, were governed by the provisions of this act as amended from time to time. In that year, a constitutional amendment empowered the legislature to pass special legislation relating to the government of Chicago, subject to a referendum of the voters of that city before becoming effective. Yet, in most important respects, the government of this second largest city in the country is still organized under the same law that constitutes the city charter of a score or more of small cities. Illinois has, however, fairly well avoided the chief defect of the general charter plan, *i.e.*, rigid uniformity, by prescribing a certain minimum number of city officials for all cities and then empowering the city council of each city to increase the number and to decide whether the new officers shall be elected or appointed. By virtue of this elastic provision, and others, the government of Chicago has been expanded through action of the city council to meet the needs of a great metropolis. Nevertheless, despite these and other liberal features of the Illinois act, not only Chicago but many another city in the state finds itself without power to do certain things which would conduce to its welfare; and every legislature is besieged for modifications of the general municipal law.<sup>2</sup>

Illinois  
city and  
villages  
act  
(1872)

The plan of classifying the cities of a state according to population and providing a different kind of charter for each class is a compromise between the two systems thus far described. The importance of taking into account the varying needs of cities differing in size and location is conceded in the provision which is commonly made for three or more classes. The legislature is left practically free to provide for each class whatever form of gov-

3. Classi-  
fication  
method

<sup>1</sup> M. R. Maltbie, "Home Rule in Ohio," *Mun. Affairs*, VI, 234-244 (June, 1902).

<sup>2</sup> In point of fact, there is nowadays considerably less uniformity in Illinois city governments than formerly. In 1910, the cities and villages act was amended so as to permit cities under 200,000 population to adopt the commission form of government; and again, in 1921, to permit cities of 5,000 population, or less, to adopt commission-manager government. Approximately sixty cities are now operating under these uniform commission or commission-manager amendments. It should be added that a few small cities are operating under special charters granted before the adoption of the present state constitution.

ernment, and to grant to the cities in a given class whatever corporate powers, it may see fit; but whatever governmental organization or corporate powers are granted to a class must be granted to all the cities included in that class. The legislature is thus given greater leeway in dealing with cities than under the general charter plan, but is prevented from discriminating against, or in favor of, a particular city,<sup>1</sup> which is the peculiar vice of the special charter system.

New York  
plan

In New York, however, where this plan is in operation, the legislature is not prohibited from passing special legislation affecting a single city or less than all the cities belonging to a certain class; but such special laws, before taking effect, must be submitted to the mayor in the three cities of the first class,<sup>2</sup> and to the mayor and council in other cities. If these local authorities approve the bill, it goes to the governor for his assent or veto; if they disapprove, it goes back to the legislature and must be repassed at the same session and approved by the governor in order to become law. This arrangement has the merit of giving the cities some protection against special legislation and the local authorities some voice in legislation affecting their cities;<sup>3</sup> but it has by no means cured the evils of special legislation.<sup>4</sup>

Pennsyl-  
vania plan

In New York, the classification method is expressly provided for in the state constitution, and it operates as a restriction upon the freedom of the legislature. In Pennsylvania, on the other hand, classification has resulted from judicial construction of the constitution, and is tantamount to an enlargement of the powers of the legislature. The Pennsylvania constitution of 1873 prohibited the legislature from passing special laws regulating the affairs of cities and other local government units. The supreme court held that it could not have been the intention of the constitution's makers to burden a comparatively small inland city, like Scranton, with a governmental organization and corporate responsibilities primarily adapted to the needs of a great tide-water, manufacturing, and commercial metropolis with more than a million inhabitants, like

<sup>1</sup> Unless, as sometimes happens, a class contains but a single city, *e.g.*, Milwaukee in the Wisconsin system.

<sup>2</sup> New York, Buffalo, and Rochester.

<sup>3</sup> In 1921, a legislative attempt to overthrow commission government in Buffalo was frustrated by the opportunity thus afforded the citizens to veto the acts of the legislature. See G. S. Buck, "Buffalo Insists," *Outlook*, CXXVIII, 483-484 (July 20, 1921).

<sup>4</sup> On the operation of this system, see G. L. Schramm, "Special Legislation for New York Cities," *Amer. Polit. Sci. Rev.*, XVI, 102-107 (Feb., 1922).

Philadelphia; or, conversely, to hamper the development and prosperity of Philadelphia by a general municipal code suited to the needs of Scranton and applying alike to all cities in the state. As a result of this decision, the Pennsylvania legislature has felt free to group the cities of that state into three classes and to provide for each class a distinct type of charter.

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Like most compromises, the plan of classifying cities is not altogether satisfactory. Cities of the same class, even when they have approximately the same population, seldom have exactly the same local conditions, and, therefore, require different governmental arrangements and corporate powers and responsibilities. Cities, also, as they grow in population, may pass from one class to another, and thus be forced to change their scheme of government and to assume new and unnecessary burdens and responsibilities.<sup>1</sup> Moreover, where classification is not expressly authorized or defined in the state constitution, legislatures have sometimes resorted to ingenious and minute subdivisions of classes whereby special legislation, disguised under some general phraseology, could be enacted for a single city. Such practices, when sustained by court decisions—as they were for a long time in Ohio—enable the legislature practically to nullify the constitutional prohibition against special legislation.<sup>2</sup>

Defects of  
classification  
method

The home-rule method of charter drafting is now authorized by the state constitution in not fewer than nineteen states.<sup>3</sup> There are also six other states where the legislature has given a broad grant of authority to some or all of its cities to amend their charters

4. Home-  
rule plan

<sup>1</sup> After the result of the census of 1920 became known, the city of Reading, Pennsylvania, was obliged to change from commission government to mayor-council government, merely because its population exceeded 100,000, which is the dividing line between cities of the second and third classes in Pennsylvania. See *Nat. Mun. Rev.*, X, 4-5 (Jan., 1921).

<sup>2</sup> See *Mun. Affairs*, VI, 234-244 (June, 1902).

<sup>3</sup> Missouri (1875), California (1879), Washington (1889), Minnesota (1896), Colorado (1902), Oregon (1906), Oklahoma (1907), Michigan (1908), Arizona, Ohio, Nebraska, and Texas (1912), Maryland (1915), Indiana (1921), Pennsylvania (1922), New York (1923), Arkansas, Nevada, and Wisconsin (1924). See F. F. Blachly, "Municipal Home Rule in Oklahoma," *Southwestern Polit. Sci. Quar.*, I, 17-34 (June, 1920); H. Barth, "Free Cities in Oklahoma," *Nat. Mun. Rev.*, XVI, 708-714 (Nov., 1927); H. L. McBain, "New York's Proposal for Municipal Home Rule," *Polit. Sci. Quar.*, XXXVII, 655-680 (Dec., 1922); R. V. Ingersoll, "Home Rule Legislation Adopted in New York," *Nat. Mun. Rev.*, XIII, 351-354 (July, 1924); L. A. Tanzer, "Municipal Home Rule in New York," *ibid.*, XIV, 246-253 (Apr., 1925); J. McGoldrick, "Home Rule in New York State," *Amer. Polit. Sci. Rev.*, XIX, 693-706 (Nov., 1925); *ibid.*, XX, 372-376 (May, 1926); C. W. Collins, "Local Self-Government and the Fourteenth Amendment," *Nat. Mun. Rev.*, III, 348-354 (Apr., 1914).

or to adopt new ones.<sup>1</sup> More than two hundred cities and villages are said to be operating under home-rule charters, including fifteen of the thirty largest cities of the country. This plan goes farther than those just described in emancipating cities from arbitrary legislative interference. The fundamental idea is that, inasmuch as the people of each city are the ones most interested in, and directly affected by, their municipal government and administration, they should have the right to draft their own charters and embody therein whatever plan of government they prefer, and to exercise such corporate powers as are not inconsistent with the constitution and general laws of the state. In other words, each city may make its own charter if it wishes to do so, just as each state is free to adopt its own constitution and to put therein whatever it sees fit, subject, of course, to the national constitution and laws.

There are different modes of framing home-rule charters, but in most states the method of procedure is to elect delegates to a charter convention (or freeholders' convention, as it is commonly called), which drafts a charter and submits it for ratification, much as a constitutional convention drafts and submits a new state constitution. As a rule, the charter goes into effect when ratified by popular vote. Amendments are usually initiated by petition and ratified by the voters.

The home-rule plan has three or four principal merits. First, it enables the people of a city to have whatever form of government they consider best adapted to their needs. In determining, too, what is best adapted, they are free to experiment—a situation from which much good ought to accrue to the cities of the entire country; for every home-rule municipality is a political laboratory, or experiment station, whose results soon become known to a wide circle of communities. Second, a genuine home-rule charter plan not only gives cities greater freedom in governmental organization, but confers upon them the right to perform any functions not forbidden by the constitution or general laws of the state. Thus relieved of the necessity of constantly begging the legislature for new grants of authority, each city is left practically free to undertake those new municipal enterprises which are everywhere becoming necessary for the welfare of the community. Third, municipal home rule benefits the state legislature by relieving it of the necessity of

<sup>1</sup>Iowa (1858), Louisiana (1896), South Carolina (1899), Mississippi (1900), Connecticut and Florida (1915). See *Ill. Const. Conv. Bull.* No. 6, "Municipal Home Rule" (1920), 406-418; O. K. Patton, "Home Rule in Iowa," *Iowa Applied History*, II, 87-210 (1914).

considering a multitude of local questions which it is poorly prepared to pass upon intelligently, even if it had unlimited time. More freedom is thus gained for the consideration of matters of importance to the state as a whole. Finally, home rule stimulates greater interest of citizens in their own local government. If things go wrong, they cannot lay the blame upon the legislature. Their government may be good, bad, or indifferent, but it is what it is because the majority of the voters are content to have it so; in them alone resides the power to change conditions at any time. The home-rule plan thus serves as an important agency in bringing home to city voters their political responsibilities in local affairs.

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An optional, or alternative, charter system has come into favor recently in a few states. This plan introduces a sort of à la carte charter service by incorporating in the general law of the state several standard types of charter providing for different forms of government, including the commission form, the commission-manager plan, and sundry varieties of the mayor-council type, and permitting each city to select for itself a form of government from the varieties thus offered. A New York law of 1914 authorizing the choice of any one of six standard types of charter was upheld as constitutional by the court of appeals in 1917. Massachusetts enacted a similar law in 1915, allowing choice among four forms; and this law is now in operation. Ohio, North Carolina, and Virginia also have optional charter laws. Obviously, this alternative, or optional, charter system, with its high degree of flexibility, has many real advantages; and it is hard as yet to discern any serious drawbacks to it. It is designed to avoid the disadvantages of both a uniform municipal code and the special charter system, without allowing such a degree of freedom as exists under the home-rule plan. In this last respect, the system meets the objections of those opponents of municipal home rule who feel that the freedom provided for in that system is liable to serious abuse.

5. Optional  
charter  
system

After all, it must be recognized that no one of the plans for relaxing legislative control makes the city entirely free. Even under the most thoroughgoing home-rule system, locally-made charters are subject to the general state laws; and the legislature, if it cares to use its power, can encroach indefinitely upon the city's freedom.<sup>1</sup> This must inevitably be so; for the city is in the state,

Necessary  
limitations  
on municipal  
freedom

<sup>1</sup> See G. B. Noble, "The Fight Against Encroachments upon Home Rule in Oregon," *Nat. Mun. Rev.*, XIV, 186-187 (Mar., 1925); *ibid.*, XII, 694-695 (Nov., 1923); V. Lynagh, "Wisconsin 'Unshackles' Her Cities," *ibid.*, XVIII, 737-742 (Dec., 1929).

is a part of the state, and is inextricably interlocked with the state in its interests and duties. Even if the legislature is disposed to leave the city entirely free to deal with purely local matters as it desires, there is not always a clear line of demarcation between things which are wholly local and those which, while perhaps primarily local, transcend city boundaries and concern the people of other portions of the state. In connection with elections, police, health protection, methods of taxation, and school administration, for example, the legislature can hardly be expected to make such a surrender of its powers as will prevent it from intervening to restrict municipal authority in ways which may not be locally acceptable. Nevertheless, despite its limitations, wherever the home-rule system has been fairly tried, it has greatly lessened the danger of unjustifiable legislative intermeddling in municipal affairs.

Adminis-  
trative  
supervision  
of municipi-  
pal affairs

The main object of all of these different plans of charter-framing, except the special-charter system, is to reduce to a minimum arbitrary or factious legislative interference with local autonomy. This end may, however, be partially attained in a manner quite dissociated from any method of granting or obtaining charters, namely, through administrative supervision over certain municipal activities by state officers or boards; such as is secured, for example, in France through the supervision of communal affairs by the national government's principal local representative, the prefect of the department.<sup>1</sup> Beginnings in this direction have already been made. In New York, the state civil service board is authorized to exercise direct supervision over the work of local civil service commissions; and in Massachusetts the state civil service commission has entire charge of the administration of the civil service law in all cities. Again, several states have placed the supervision of the enforcement of their election laws in the hands of a state official or board, in order to check local abuses.<sup>2</sup> Similarly, state boards of health or education, state finance departments or commissions, and state public utilities or public service commissions have, in a number of states, taken over in recent years many of the functions previously performed by the state legislature. A number of states go so far as to provide for state auditing of municipal accounts, and require the adoption of a uniform system of book-keeping in all cities and the making of regular financial reports in

<sup>1</sup> W. B. Munro, *The Government of European Cities* (rev. ed., New York, 1927), Chap. XII.

<sup>2</sup> *E.g.*, the state superintendent of elections in New York. This office was abolished in 1921 and its duties were transferred to local election officials.



a specified form to the state auditor or some other state authority.<sup>1</sup> Whenever, furthermore, a problem of public service transcends in scope the boundaries of several adjacent municipalities, there is a natural tendency to call in state administrative control. Under these circumstances, we are apt to find such metropolitan park, sewerage, or police boards as exist in Massachusetts, with authority over the metropolitan district of Boston.

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As a rule, state administrative supervision on these lines has proved far more beneficial to the cities directly affected by it than has legislative supervision. In contrast with the amateurish, capricious, and often unintelligent regulation by the legislature, administrative control affords at least the opportunity for supervision by experts possessing, or in a position to acquire, exact knowledge of the problems with which they have to deal, and capable of developing a more or less consistent and permanent policy. The possibilities of administrative supervision have, however, only fairly begun to be realized. Their development is impeded by deeply rooted devotion to the principle of local home rule. Besides, much of the state supervision which we have had has been conducted through more or less independent and uncorrelated administrative boards or commissions whose effectiveness is frequently impaired by the influence of political considerations.

Advantages and obstacles

In order to unify and harmonize administrative supervision, it has been forcefully urged<sup>2</sup> that in each state there should be created as a part of the general governmental system a department of municipal affairs, or local government, whose function it would be (1) to secure a general unified system of municipal government, subject to variations to suit the needs of different localities; (2) to secure the employment of skilled legal, financial, engineering, and medical advisers on all aspects of municipal administration; (3) to link up public health and educational activities with other vitally related functions, such as city-planning, housing, and recreational facilities; (4) to bring about the proper control of local finances and public utilities; (5) to facilitate closer coöperation between adjacent cities having common problems; and (6) to render valuable service to all the cities in the state by conducting expert

A state department of municipal affairs

<sup>1</sup> W. Kilpatrick, "State Supervision of Municipal Accounts," *Nat. Mun. Rev.*, XII, 247-254 (May, 1923); J. N. Bayne, "Saskatchewan's Centralized Supervision of Municipalities Gives Satisfaction," *ibid.*, XV, 689-693 (Dec., 1926).

<sup>2</sup> T. S. Adams, in C. S. Bird, *Town-Planning for Small Communities* (New York, 1917), 327-330.

investigations and giving free expert advice from a central department. Small cities, in particular, are not in a position to employ men of high skill, and are frequently led into error and wasteful expenditure; and, although many of their local problems are similar, they generally act independently, and often in complete ignorance of the experience of other cities.<sup>1</sup> They would be specially helped by the central agency suggested.

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<sup>1</sup> In 1919, the Pennsylvania legislature created a state bureau of municipalities. See *Nat. Mun. Rev.*, VIII, 264 (May, 1919); *Amer. City*, XXVI, 576-578 (June, 1922).

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## CHAPTER XLII

### THE MAYOR-COUNCIL TYPE OF CITY GOVERNMENT

In whichever of the ways described in the preceding chapter a city obtains its charter, the scheme of government that it will have is almost certain to conform to one of three distinct types: mayor-council, commission, commission-manager. The principal features of the first type will be described in the present chapter; those of the second and third types, in the chapter immediately following. The mayor-council form, which is still found in a decided majority of cities of more than thirty thousand inhabitants, is based on the time-honored doctrine of separation of powers; and its most distinguishing feature is the conspicuous and influential position assigned to the chief executive. This chief executive is the mayor, who, accordingly, will first occupy our attention.

The mayor

American mayors are uniformly elected by direct popular vote; never by the council, as in Europe.<sup>1</sup> Their terms range from one year in some of the smaller cities, especially in New England, up to five years; in the largest cities, *e.g.*, New York, Chicago, Philadelphia, Los Angeles, and Detroit, it is four years, but elsewhere the term is most commonly two years. Mayors generally receive some compensation for their services, varying from a mere nominal sum in small places up to \$12,000 in Philadelphia, \$18,000 in Chicago, \$20,000 in Boston, and \$40,000 in New York. In New York, Chicago, and Boston, the mayor's salary is greater than that of the governor of the respective states.

Powers  
and duties

As the city's chief executive, the mayor is expected to enforce the ordinances or local laws passed by the city council and to maintain order. He represents the city in its dealings with other municipalities and upon ceremonial occasions. He is sometimes given the right to pardon violators of municipal ordinances. He may also exercise more or less general supervision over the work of the various city departments, although in practice the importance

<sup>1</sup> Except in some commission or commission-manager cities. See p. 941 below. On the position and powers of the mayor in European cities, see W. B. Munro, *The Government of European Cities* (rev. ed., New York, 1927), 132-136 (England), 285-303 (France).

of this function depends on his power to appoint and remove department heads. The tendency in charter revisions where the mayor-council type of government has been retained is to increase the mayor's power and responsibility in appointments and removals. But in the great majority of cities his appointments do not take effect until they are approved by the council. This requirement was originally designed to check a possible abuse of the appointing power by an unscrupulous mayor; but it has often facilitated the shifting of responsibility for bad appointments back and forth between the mayor and the council, and has furnished the occasion for many malodorous political trades between the mayor or his friends and the political factions represented in the council. The system is fraught with more possibilities for evil than for good, and it might well be superseded by a concentration in the hands of the mayor of entire authority and responsibility for the appointment of department heads, as has come about in New York<sup>1</sup> and a few other places.

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XLII  
Appoint-  
ments

In the national government, the president, as we have seen, may remove officials without any action on the part of the Senate, even though the consent of that body was necessary for the original appointment.<sup>2</sup> Many cities, however, not only require councilmanic confirmation of appointments, but make the council's consent necessary to removals. This, of course, greatly reduces the effectiveness of the mayor's removing power, correspondingly diminishes his responsibility for the proper conduct of the city administration, and is sometimes a serious obstacle to the introduction of needed reforms. The tendency in recent charters has been to discard this feature, along with councilmanic confirmation of appointments. Where the power of removal resides in the mayor alone, he is in a position not only to supervise, but to control, all departments of the city government.<sup>3</sup>

Removals

Closely related to the mayor's power over the administrative departments is the part which he frequently, although not in a majority of cities, plays in the preparation of the annual budget or financial program. This work used to be an exclusive function of the council, and in most cities it is still performed by a com-

Budget-  
making

<sup>1</sup> In practice, however, the mayor's power of appointment in New York City is restricted in numerous legal and extra-legal ways. See E. Harvier, "Mayor Limited in Appointments," *N. Y. Times*, January 3, 1926.

<sup>2</sup> See p. 272 ff. above.

<sup>3</sup> In some states, *e.g.*, Ohio, mayors may be removed by the governor for cause. See W. H. Edwards, "Governor Donahey and the Ohio Mayors," *Nat. Mun. Rev.*, XIII, 350-356 (June, 1924).

mittee of that body; but in an increasing number of cities the budget is now drawn up by the mayor alone.<sup>1</sup> Where this system prevails, as in Boston, no proposal to spend the city's money can legally be considered by the council unless it emanates from the mayor; all that the council can do is to reduce or strike out recommended appropriations. In New York City, the budget is prepared by the board of estimate and apportionment, of which the mayor is a member, and in which he is given three votes. In many other places, a tendency is manifest to allow the mayor a larger share in allocating city revenues.

Furthermore, the mayor presides in council meetings in cities of Illinois and of some other states; and everywhere he is given a direct share in the enactment of such local legislation as is authorized by the city charter. He transmits to the council messages and recommendations, together with the reports of various city officials; and in all cities of the type now under consideration he may prevent or delay the enactment of ordinances, including the granting of franchises, by the use of the veto power, although his veto may usually be overridden by a two-thirds or three-fourths vote. Where the veto extends to separate items in appropriation bills, the mayor is in a position to prevent or check waste and extravagance, if he will, in the use of the city's funds. Although much more frequently exercised than the veto of the governor or the president, the mayor's veto has not contributed greatly to the efficiency of our city governments.<sup>2</sup>

The  
council:  
decreased  
importance

In marked contrast, but contemporaneous, with the rise of the mayoralty in American cities has been the decline of the law-making branch, commonly known as the council or board of aldermen;<sup>3</sup> and it is interesting to observe, in passing, that these

<sup>1</sup> D. C. Sowers, "Our City Councils: Denver—the Lengthened Shadow of the Mayor," *Nat. Mun. Rev.*, XIII, 550-553 (Oct., 1924).

<sup>2</sup> The following articles are interesting sketches of recent mayors in: Boston, *Nat. Mun. Rev.*, XV, 253-259 (May, 1926); Buffalo, *ibid.*, XVIII, 789-790 (Dec., 1929); Chicago, *ibid.*, XV, 390-394 (July, 1926), XVI, 688-695 (Nov., 1927), XVII, 663-673 (Nov., 1928); Cincinnati, *ibid.*, XVIII, 68-75 (Feb., 1929); Detroit, *ibid.*, XV, 205-207 (Apr., 1926), XVIII, 16-21 (Jan., 1929); Houston, *ibid.*, XVII, 317-320 (June, 1928); Indianapolis, *ibid.*, XVI, 684-687 (Nov., 1927); Jersey City, *ibid.*, XVII, 514-521 (Sept., 1928); Los Angeles, *ibid.*, XVII, 27-32 (Jan., 1928); Milwaukee, *ibid.*, XVIII, 549-554 (Sept., 1929); New Bedford, *ibid.*, XVIII, 377-381 (June, 1929); New York, *ibid.*, XV, 158-165 (Mar., 1926); XVII, 567-577 (Oct., 1928); Omaha, *ibid.*, XVI, 111-117 (Feb., 1927); Philadelphia, *ibid.*, XVI, 302-309 (May, 1927); St. Louis, *ibid.*, XVI, 164-170 (Mar., 1927); St. Paul, *ibid.*, XVII, 203-207 (Apr., 1928); San Francisco, *ibid.*, XVIII, 163-167 (Mar., 1929); Seattle, *The Woman Citizen*, XII, 5-8 (Dec., 1927).

<sup>3</sup> In all European countries, the council is the most important organ of

two tendencies in municipal affairs, the exaltation of the chief executive and the decline of the legislative branch in popular confidence and esteem, almost exactly synchronize with similar tendencies in the state and national governments. Why the council, which completely overshadowed the mayor and dominated the entire city administration before 1850, and still exercises important legislative powers, should to-day almost everywhere enjoy only a modicum of popular respect, is partly explained by the decline in the caliber of councilmen which set in about the middle of the nineteenth century when our cities were growing with unprecedented rapidity. With this growth came a corresponding expansion in the variety of municipal activities. At first, the administration of these services fell to committees of the council. But their incompetence led state legislatures very generally to strip the council of most of its administrative responsibilities and transfer them to independently chosen heads of departments, to popularly elected boards, even to state commissions, or else to entrust them to the mayor. Thus shorn of most of its former administrative functions, the council now finds its legitimate activity almost wholly restricted to the sphere of municipal legislation—a sphere which, in the average city, is not sufficiently broad to challenge the interest and activity of men of first-rate ability; while in the largest cities, where the opportunities for distinction in the field of local legislation are more abundant and varied, adverse political conditions usually serve to deter men of more than fair ability from entering upon service in the council. Another partial explanation of the council's decline is to be found in the common practice of electing councilmen from small districts or wards, instead of on a general ticket for the entire city.<sup>1</sup> The general ticket system is not without serious disadvantages, especially in our largest cities, but it could hardly prove less productive of high-grade councilmen than the ward system. Then, too, the matter of compensation, or the lack of it, enters into the explanation. Many cities either pay their councilmen nothing or allow them only nominal sums for which properly qualified men cannot afford to make the sacrifices which service in the council entails. Few facts connected with the mayor-council type of government are more to be regretted than that the council,

municipal government. See W. B. Munro, *The Government of European Cities* (rev. ed., New York, 1927), Chaps. vi-vii (England), xv (France).

<sup>1</sup> In the 99 cities of over 30,000 population in 1916 which had a single-chamber council, 46 elected councilmen by wards, 11 at large, and 42 by a combination of the two methods.

with all its potentialities for good, should have so degenerated in many cities as to become a byword among the best citizens. It is truly "the lowest rung in the ladder of American public life," and, unfortunately, few of its members ever manage to rise above it; whereas it ought to be at once the starting-point and the incentive for long, useful, and conspicuous political careers.

There is no uniformity of size among city councils; seldom, indeed, outside of Illinois,<sup>1</sup> does the size of the council bear any definite relation to the size of the city. New York has a board of aldermen of seventy-one members;<sup>2</sup> Chicago has a council recently reduced from seventy to fifty members; and the number elsewhere runs downward all the way to nine, even in such large cities as Denver, Detroit, Seattle, and Pittsburgh.<sup>3</sup> Some councils, furthermore, are organized on a unicameral, and others on a bicameral, basis. The single-chamber council is found in the majority of cities, especially those with a population of less than thirty thousand; of the hundred and twenty-four cities of this description in 1916, only fifty had a bicameral council. Many cities that once followed the bicameral plan long since abandoned it, the latest large ones to do so being St. Louis, Philadelphia,<sup>4</sup> and Baltimore. To-day, none of our twenty-five largest cities has the bicameral form.<sup>5</sup> No city that has once discarded it has ever gone back to it; for it has few, if any, advantages which are not more than offset by the vexatious delays, by the friction which frequently arises between the two chambers, and by the increased opportunities for chicanery and corruption.

The primary function of the council is to give formal expression to the legislative will of the city through the enactment of local

<sup>1</sup> In this state, the number of council members is graduated by law according to population.

<sup>2</sup> The New York board of aldermen consists of the president of the board, elected by the voters of the city at large, the five borough presidents (one elected in each borough), and sixty-five aldermen elected from single-member districts. A very frank opinion of the board of aldermen is expressed by a woman member of the board, Mrs. Ruth Pratt, in "Men Are Bad House-keepers," *Harper's Mag.*, CLIV, 682-688 (May, 1927).

<sup>3</sup> Most commission-governed cities have councils, or commissions, of five members.

<sup>4</sup> H. A. Barth, "The Philadelphia City Council," *Nat. Mun. Rev.*, XIII, 294-299 (May, 1924). Cf. E. L. Barth, "Our City Councils: Chicago's Time Consumed by Details," *ibid.*, XIV, 550-554 (Sept., 1925).

<sup>5</sup> Except that in New York City the board of estimate and apportionment acts as a second chamber in the enactment of certain "local laws," under the recent home-rule constitutional amendment. On the relation of these two bodies, see J. McGoldrick, "New York—the Eclipse of the Aldermen," *Nat. Mun. Rev.*, XIV, 360-368 (June, 1925); R. Forbes, "The Municipal Assembly—New York's Home Rule Legislature," *ibid.*, XVIII, 632-634 (Oct., 1929).



laws called ordinances. The scope of this ordinance power is always set forth in more or less detail in the city charter or municipal code; and no exercise thereof is valid which is not clearly authorized by some provision of the charter, or which is inconsistent with any state statute or any provision of the state or national constitution. City ordinances fall into two main classes. The first are called contractual ordinances, because they grant special favors, privileges, or franchises, which, if accepted by the grantee, set up a contractual relation between the city and certain private persons or corporations—a relation that can legally be changed only with the consent of both parties. In this class are included franchise grants to railroads, warehouse companies, street railways, express, telephone, and telegraph companies, electric lighting, gas, and central-heating companies, and sometimes also water-supply companies.

The second class comprises purely legislative ordinances; and of these there are several different kinds: (1) ordinances relating to the organization of the city government, filling in the details which the charter leaves to be supplied; (2) ordinances relating to financial matters, such as those imposing taxes and license fees for certain occupations, authorizing loans, and making appropriations for municipal purposes; (3) ordinances initiating public improvements (often involving the exercise of the right of eminent domain), such as street-openings, widening and paving streets, laying a sewerage system, the erection of public buildings, the laying out of parks and playgrounds, and the installation of a water-supply; (4) ordinances regulating the use and lighting of streets and public places; (5) ordinances regulating the construction of buildings and billboards, usually called the building code; (6) ordinances constituting the sanitary code, including regulations for the disposal of all forms of waste, street and alley cleaning, drainage and plumbing requirements, milk distribution and food inspection, and quarantining communicable diseases; (7) ordinances protecting the public safety and morals by restricting the sale of liquor, fire-arms, and fireworks, censoring theaters and moving-picture exhibitions, and suppressing gambling and vice; (8) ordinances regulating public utility corporations by fixing rates, prescribing equipment, and regulating service. Unlike contractual ordinances, legislative ordinances are subject to modification or repeal by the council.

It should be borne in mind that city councils rarely or never have a perfectly free hand in dealing with subjects which clearly fall within the range of the ordinance power. All ordinances, for

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Legislative,  
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example, must be reasonable (although they are presumed to be so until the contrary is established in legal proceedings before some court); ordinances must not make special or unwarranted discriminations in granting privileges or imposing restrictions; they must not unduly restrain or interfere with trade; they must not be in conflict with any provision of the state constitution, or with any statute, or with the national constitution or laws; and all must be enacted in due compliance with the formalities prescribed in the charter. Furthermore, the legislative authority of a city is not vested exclusively in the council. Certain administrative bodies, such as the board of health, or the fire department—even single officers—are often empowered to prescribe rules within their respective fields of jurisdiction. Such rules are called regulations, in order to distinguish them from ordinances; but they are generally of the same legal force as ordinances; they are subject to the same restrictions, and are no less binding upon all citizens.

Importance of administrative activities

Although covering many pages in the average municipal charter and bulking large in the public eye, the legislative function of city government is much less important than the work of the administrative departments. It is the departments that manage the multifarm, and sometimes highly technical, public services rendered by the modern municipality, and carry on the daily routine of municipal business. They attend, for example, to the collection and disbursement of the city revenues, the negotiation and retirement of city loans, the organization, training, and daily work of the members of the police force and the fire department, the construction and engineering operations of the department of public works, the enforcement of health, building, and fire regulations; and they perform a multitude of other activities which affect, more or less directly, the safety, comfort, and general well-being of every citizen. This administrative work is often given scant publicity in the newspapers, and the average city dweller knows too little about it. On the other hand, political machines and special interests are fully aware of its political and pecuniary possibilities, and often resort to desperate and corrupt methods in order to control it. The older city charters gave relatively little attention to departmental organization and functions, but the more recent ones have given more adequate consideration to this important phase of city government.<sup>1</sup>

<sup>1</sup> On departmental organization and activities, see W. B. Munro, *Municipal Government and Administration*, II (New York, 1923). Administrative or-

In the organization, number, and titles of administrative departments, as in so many other respects, there is the greatest lack of uniformity. In most commission-governed cities, there are five departments into which are compressed, and sometimes cramped, all the varied municipal activities; but from this the number runs up to about twenty-two in New York, and approximately thirty in Chicago and Boston. Like the size of the council, the number of departments bears little or no relation to the size of the city. In places, however, of moderate population—say from thirty thousand to one hundred thousand—one is almost certain to find at least six distinct departments. There is (1) a law department, headed by the corporation council or city attorney, and charged with the duty of giving legal advice to the mayor, council, and all city departments, prosecuting or defending all suits brought by or against the city, drawing up or approving all city contracts, and drafting municipal ordinances; (2) a department of finance, which is likely to include the offices of city treasurer, city comptroller, auditor, and tax assessors or collectors; (3) a department of public safety, including the machinery of fire, police, health, and building administration; (4) a department of public works, which is usually the largest department, with subdivisions or bureaus attending to the care of the streets, public buildings, parks and playgrounds, sewerage and water systems, and practically all the engineering work of the city; (5) a health department, charged with the enforcement of the provisions of the sanitary code; and (6) a department of education—although in numerous cities, notably in Illinois, the administration of school and library affairs is handled by more or less independent school or library boards.

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partments

In early times, and well down toward the Civil War, the various administrative departments or services were presided over by committees of the council; and this is the system which still exists and gives general satisfaction in English boroughs. In this country, however, the plan, as we have seen,<sup>1</sup> broke down, and in its place emerged another distinctive feature of American municipal government, namely, administrative departments legally independent of the council, and presided over by persons who are seldom chosen by the council and are never members of that body. At the

Depart-  
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ganization in European cities is dealt with in the same author's *Government of European Cities* (rev. ed., New York, 1927), Chaps. viii (England), xvii (France). Cf. S. G. Lowrie, "A Needed Supplement to Home Rule Charters," *Amer. Polit. Sci. Rev.*, XXI, 827-830 (Nov., 1927).

<sup>1</sup> See pp. 926-927 above.

head of departments in which promptness of decision, maintenance of discipline, and capacity for vigorous action are the qualities most needed, *e.g.*, the police and fire departments, one finds, ordinarily, a single commissioner. On the other hand, those activities which entail discussion, deliberation, and decision of matters in which the differing views, and perhaps conflicting interests, of various racial, religious, or other local factors are involved, *e.g.*, school and library administration and welfare and recreational work, are usually in charge of a board or commission. No city finds it wise or expedient to adhere to either of these arrangements to the entire exclusion of the other; each type of organization has its strong points and its limitations.

In the selection of department heads, different methods are employed, and in few cities is any one method followed exclusively. Popular election, as in the case of the comptroller in New York, Philadelphia, and other cities, is probably the least satisfactory of all. Election of some heads by the council prevails in many cities. Appointment by state authorities is comparatively rare, and in theory is hardly less satisfactory than popular election; although in Boston, St. Louis, and Baltimore, where the head of the police department is selected in this way, a better type of official has been secured than formerly through local action. School or park boards are in some cities, notably Philadelphia and Pittsburgh, appointed by the judges of the local courts, a method which, theoretically at least, has little to commend it. A few cities, of which New York and San Francisco are the most conspicuous examples, have given the appointing power to the mayor without requiring councilial, or other, confirmation. In Boston, the mayor designates department heads; but their appointments do not become effective unless within thirty days the state civil service commission indicates its formal approval of the persons selected. In the great majority of cities, the mayor appoints most of the department heads, but his appointments are subject to the approval of the council. Finally, because of the unfortunate part which political considerations have played in the choice of department heads, with consequent impairment of administrative efficiency, some civil service reformers have advocated selection by competitive examinations, otherwise known as the merit system. As yet, however, no city has applied this method to any considerable extent in filling these high positions. For the selection of subordinates, however, including the bureau chiefs and the great mass of clerical and technical employees, and even labor-

ers, competitive examinations are widely used; and there can be no doubt that they yield results far superior to the old spoils system in which administrative efficiency and the city's welfare were considerations entirely secondary to political influence and rewards. Indeed, the merit system has made much greater progress in the field of municipal government than in connection with state administration. About one-fourth of the 1,467 cities of the country whose population in 1920 exceeded five thousand are employing some sort of merit system. In this number are included fifty-five of the sixty-eight cities having a 1920 population of more than 100,000, and all of the twenty-five cities with a population of more than 250,000.<sup>1</sup>

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The mayor-council form of government is sometimes referred to as the federal type of city government, because, first appearing in Baltimore in 1796 and in Detroit about ten years later, and hence soon after the adoption of the federal constitution, it embodies a number of points which bear striking resemblance to some of the most conspicuous features of the organization of the national government. The evidence, however, of direct "influence of the federal analogy," as it has been called, is not altogether convincing, in view of the fact that there is almost, if not quite, as much similarity between the mayor-council type and the constitutional arrangements of the several states; so that it is difficult to determine whether the national government or the state governments exerted the greater influence.<sup>2</sup> In any event, upwards of a thousand cities

Dissatis-  
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of city  
government

<sup>1</sup> On civil service reform in city government, see M. L. Cooke, *Our Cities Awake* (Garden City, 1918), Chap. vii; W. D. Foulke, *Fighting the Spoilsmen* (New York, 1919); Governmental Research Conference, *Character and Functioning of Civil Service Commissions* (pamphlet, Ann Arbor, 1922); C. L. King, "The Appointment and Selection of Government Experts," *Nat. Mun. Rev.*, III, 304-315 (Apr., 1914); A. L. Lowell, "Administrative Experts in Municipal Government," *ibid.*, IV, 26-31 (Jan., 1915); W. B. Munro, *Municipal Government and Administration*, II, Chap. xxiv; National Municipal League, "Report of the Special Committee on Civil Service," *Nat. Mun. Rev.*, XII, 441-471 (Aug., 1923); A. M. Swanson, "The Practicability of the Merit System," *ibid.*, IV, 32-39 (Jan., 1915); L. D. White, "The Conditions of Municipal Employment in Chicago," *ibid.*, XIV, 629-636 (Oct., 1925); J. B. Kingsbury, "The Merit System in Chicago from 1895 to 1915," *Public Personnel Studies*, III, 306-311 (Nov., 1925); IV, 54-65 (Feb., 1926); IV, 154-165 (May, 1926); IV, 178-184 (June, 1926); E. O. Griffenhagen, "The Merit System in Chicago and Cook County," *Nat. Mun. Rev.*, XVIII, 690-695 (Nov., 1929); J. F. White, "Indianapolis at Last Tries the Merit System," *Nat. Mun. Rev.*, XVI, 630-632 (Oct., 1927); L. B. Swift, "Civil Service in Indianapolis," *Good Govt.*, XLI, 113-116 (Aug., 1924). For further references, see P. O. Ray, *Introduction to Political Parties and Practical Politics* (3rd ed., 1924), 600-603.

<sup>2</sup> On the "influence of the federal analogy," compare W. B. Munro, *Municipal Government and Administration*, I, 93, 103, and H. L. McBain, "Evolu-

in the United States have become convinced during the past twenty years that—however well-suited to the needs of the national government and of the state governments—checks and balances, divided responsibility and authority, and bicameral legislatures were responsible for much of the inefficiency characterizing American cities in the nineteenth century, and, in general, serve no useful purpose in modern city government. The forms of organization which have rapidly displaced the mayor-council type in this score of years or more will be described in the following chapter.

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## CHAPTER XLIII

### COMMISSION AND MANAGER GOVERNMENT

Defects of  
mayor-  
council  
government:

1. Fundamental

The fundamental defect of the mayor-council type of city government is the division of authority and consequent scattering of responsibility. Legislative authority, for example, is divided between the council and the mayor, and each may, with some show of right, claim that the ultimate responsibility rests with the other. In administration, likewise, authority is diffused and responsibility scattered. Administrative functions are placed in the hands of a group of officials separate and distinct from the legislative body, and formal contacts between the two arise only when the council is called upon to confirm the appointment of department heads by the mayor, to vote the annual appropriations for the work of the departments, and to pass ordinances creating, reorganizing, or abolishing departments. Because of their joint participation (usually) in the selection of department heads, the mayor and council divide responsibility for the efficiency or lack of efficiency in the city's administrative services. As the legislative body, the council has no legal right to meddle with the details of city administration. In practice, however, few city activities are found to be outside the sphere of councilmanic influence. Over and over it has been proved that the body which provides the money to carry on departmental activities will, in one way or another, have something to say concerning the expenditure of its appropriations.

2. Incidental

The foregoing defects seem to be inherent in, if not inseparable from, the system of checks and balances, "another name for which is friction, confusion, and irresponsibility." But there are certain other shortcomings which, although not fundamental and inherent, are almost universally associated with the mayor-council form. In the first place, the council is usually a much larger body than is necessary in order to represent the various elements in the city and to transact the city's legislative business satisfactorily. Where the bicameral plan persists, the division of authority and responsibility is carried still farther; and the ordinary citizen is usually completely in the dark as to who is to blame for what passes the council



or is smothered in committee. In almost every mayor-council city, there is, also, an unnecessarily large number of elective officers who have purely routine functions, all, or practically all, minutely prescribed by state law or city ordinance. Besides dividing responsibility for the city administration, the popular election of such non-policy-determining officers lengthens the ballot, confuses the voter, and serves no purpose except to enable political machines more easily to secure and retain control of the city government. To these defects must be added the evils arising from the almost universal ward system of electing members of the council, from their nomination and election by a cumbersome and expensive partisan primary and election system, from the absence of any method of quickly removing unsatisfactory officials from office, from the inability of the people to secure needed ordinances if the council fails to enact them, and from the absence of any popular veto upon legislative acts of the mayor and council which may be opposed to the best interests of the community.

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Not a few cities, attributing the unsatisfactory character of their government merely or mainly to these incidental defects, have simply lopped off one or more of them; or, more rarely, have attempted to graft upon the old stock some of the newer political devices. Thus, many cities have (a) reduced the size of the council and the number of elective officials, or (b) abolished the bicameral council, or (c) replaced the ward system with election at large, or (d) discontinued partisan primaries and substituted either nomination by petition or non-partisan primaries and elections, or (e) concentrated the appointing power in the mayor, or (f) authorized a popular referendum in the case of all franchise ordinances, or (g) provided for the popular initiative and referendum in connection with other ordinances; and (h) a few, indeed, have adopted the recall.<sup>1</sup> Such piecemeal reforms have often produced good results; but they do not go to the root of some of the most serious municipal ills.

Reformed  
mayor-  
council  
government

Recognizing this fact, nearly eight hundred cities have openly repudiated the old doctrine of separation of powers, with its checks and balances, divided authority, and diffused and diluted

Commis-  
sion gov-  
ernment

<sup>1</sup> See B. J. Hendrick, "The Recall in Seattle," McClure's, XXXVII, 647-663 (Oct., 1911); F. W. Cottlett, "The Working of the Recall in Seattle," *Annals Amer. Acad. Polit. and Soc. Sci.*, XLIII, 227-236 (Sept., 1912). An election for the recall of Mayor Bowles was held in Detroit in September, 1930, resulting in his removal. See *N. Y. Times*, June 29, 1930; *Nat. Mun. Rev.*, XIX, 563-564 (Aug., 1930).

responsibility, and have substituted therefor either the commission or the manager form of government. The first step in this direction was taken by Galveston in 1900. Progress was slow for a few years, but after Des Moines reconstructed its government on the commission basis in 1907 the plan spread rapidly, especially among the smaller cities of the country. It has now been adopted in almost a hundred cities of more than 30,000 inhabitants, including seven with populations in excess of 200,000, namely, Buffalo,<sup>1</sup> New Orleans, Jersey City, Newark, St. Paul, Oakland, and Portland, Oregon. Although commission government is at present authorized by law in all but four states—New Hampshire, Vermont, Rhode Island, and Delaware—<sup>2</sup> comparatively few cities have adopted the plan since 1914.

Essential  
features

Commission government involves greatly simplified machinery.<sup>3</sup> In place of a bicameral council, or the large and unwieldy single chamber, in place of a mayor and a council each having some of the powers which belong primarily to the other and each serving as a check upon the other, in place of theoretically separate and independent legislative and administrative departments, one finds a small commission, consisting usually of five members elected by popular vote and made conspicuous by the smallness of their number and the abolition of most of the remaining elective municipal offices. In this commission are concentrated all of the legislative, and most of the administrative, authority of the city government. As the legislative body, the commission has the ordinance power enjoyed by the council in mayor-council cities, including the right to fix the tax rate and pass the annual appropriation bills. As an administrative body, it exercises all of the administrative authority which in mayor-council cities is shared by the mayor, administra-

<sup>1</sup> After twelve years' experience, Buffalo, in August, 1927, voted to abandon commission government. The new charter adopted at that time provides for a mayor and fifteen councilmen, six elected at large and nine from districts. Heads of departments are appointed by the mayor with the approval of the council. Partisan elections have been restored. See H. H. Freeman, "Buffalo Adopts a New Charter," *Nat. Mun. Rev.*, XVII, 13-15 (Jan., 1928).

<sup>2</sup> Of the 1,467 cities in the United States in 1920 with a population of 5,000 or more, 303, or twenty per cent, had, by November, 1923, adopted the commission plan by popular vote. Fifty-three of the 303, or about seventeen per cent, had also abandoned it—fifteen adopting commission-manager government, the others reverting to the mayor-and-council plan. J. G. Stutz, in *Nat. Mun. Rev.*, XIII, 3-4 (Jan., 1924). Most of the reversions occurred in small cities, although Buffalo, Denver, Lowell, and Nashville should be noted as exceptions. On Nashville's experience, see *Nat. Mun. Rev.*, IV, 646-651 (Oct., 1915); *ibid.*, X, 156-160 (Mar., 1921).

<sup>3</sup> See C. W. Eliot, "City Government by Fewer Men," *World's Work*, XIV, 9419-9426 (Oct., 1907).

tive departments, and council. Each member is assigned to serve as the head of one of the five departments into which the administrative work is usually divided; and the commission appoints the subordinate officials unless the selection has been left to individual commissioners or to a special civil service commission. In brief, the essence of commission government is the thoroughgoing fusion of legislative and executive functions, accompanied by a complete centralization of responsibility, in the hands of a very small group of relatively conspicuous officials.

The foregoing constitute the *essential* features of the commission system. But, in addition to them, certain non-essential or incidental features almost invariably appear and contribute in no small measure to the success of the plan. For example, almost everywhere the ward system has been abolished and the members of the commission are elected from the entire city—an arrangement which helps to make the office of commissioner more conspicuous and attractive.<sup>1</sup> Moreover, candidates for the commission are generally nominated either by petition or by non-partisan primary, and are voted for on election day by means of a non-partisan ballot.<sup>2</sup> With such extensive powers vested in a small group, it is wise for the public to retain means of direct and prompt control over the commissioners. To this end, provision is made in practically all commission-governed cities outside of Pennsylvania for the recall of an unsatisfactory commissioner, and of any other elective officers, by means of a special election before the expiration of the term of office.<sup>3</sup> Another common safeguard is the initiative and referendum, for use in connection with the enactment of ordinances.<sup>4</sup> Each of these features has contributed something to the improved civic conditions which have usually followed the adop-

Incidental  
features

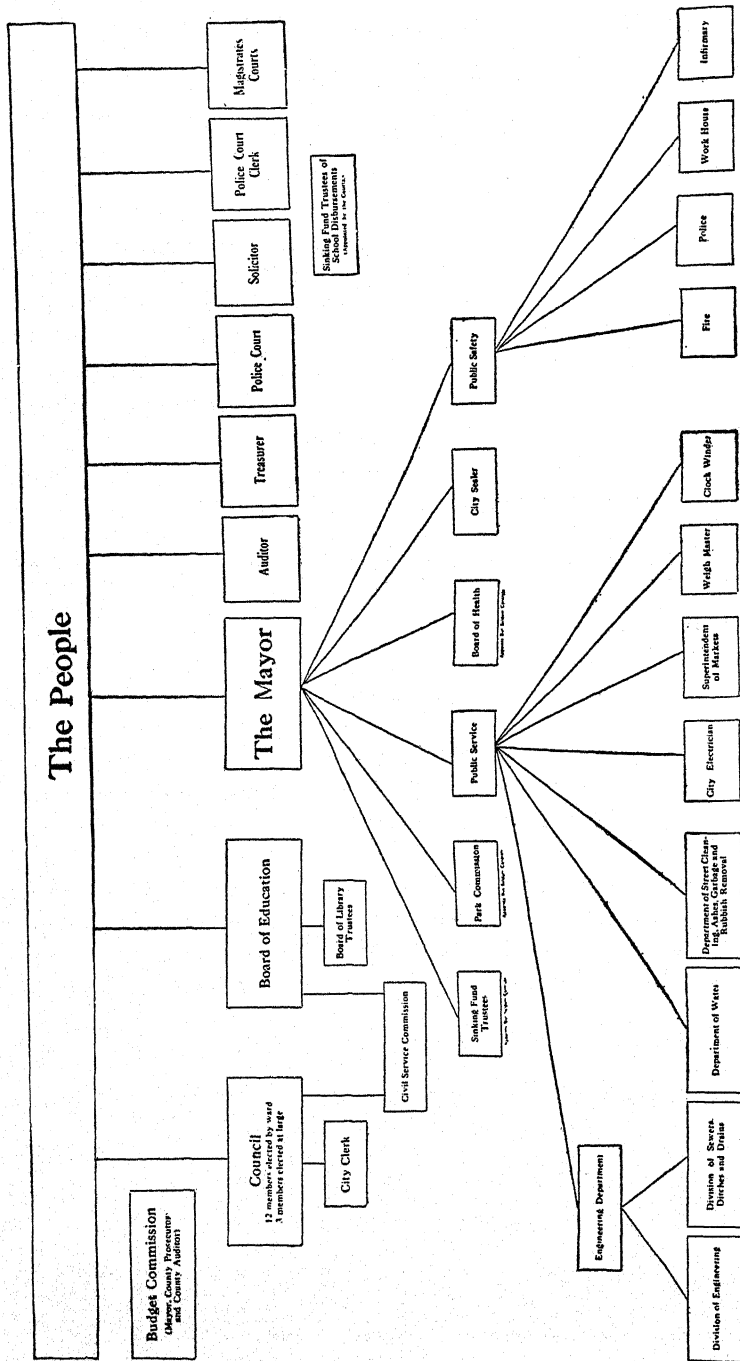
<sup>1</sup> In the largest cities, the general ticket system, *i.e.*, election at large, is open to serious objections, and election from a few large districts seems preferable.

<sup>2</sup> Commission-governed cities in Pennsylvania had non-partisan nominations and elections from 1913 to 1919, when partisan elections were restored.

<sup>3</sup> See E. S. Mason, "Learning to Use the Recall" [in Tacoma], *Nat. Mun. Rev.*, I, 659-661 (Oct., 1912); F. S. Fitzpatrick, "Some Recent Uses of the Recall" [in Oakland and Nashville], *ibid.*, V, 384-387 (July, 1916); F. N. Shannonhouse, "How the Recall Worked in Charlotte," *Nat. Mun. Rev.*, IX, 3-5 (Jan., 1920); A. L. Carlson, "The Recall in Sioux City, Iowa," *ibid.*, IX, 699-702 (Nov., 1920); R. S. Rankin, "Unsuccessful Recall Attempted in Greensboro," *Nat. Mun. Rev.*, XVII, 114-115 (Feb., 1928). On the recall in California, see F. L. Bird and F. M. Ryan, *The Recall of Public Officers* (1930).

<sup>4</sup> A large amount of information relating to the operation of the initiative, referendum, and recall in commission-governed cities will be found in *Equity*, XVIII, 162-311 (Oct., 1916).

# PLAN OF THE FORMER MAYOR-COUNCIL GOVERNMENT IN DAYTON



Courtesy of Dr. L. D. Upson

tion of the commission system. It should, however, be clearly understood that, with the possible exception of the initiative and referendum, they are neither essential nor peculiar to the commission form of government, and that any mayor-council city can have them, as some do, without adopting the commission plan.

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In their laws authorizing the commission system, most states have followed the so-called Des Moines plan rather closely. There is, however, naturally, a great amount of variation of detail, and some differences appear in relatively important features. For example, the term for which members of the commission are elected, though commonly two or four years, varies from one year in the case of Gloucester, Massachusetts, to six years in Wisconsin cities. Furthermore, in some cities the terms of all members expire at the same time, although the more usual arrangement is for three members to be chosen at one election and two at the next. The method of assigning administrative departments to the various members of the commission also varies. In South Carolina, the assignment is made by the mayor. Most cities follow the original Des Moines plan, which permits the commissioners themselves to make the assignment by a majority vote. Under the charter laws of Massachusetts, Arkansas, and Louisiana, and in a considerable number of scattered cities, however, each candidate for the commission has his name placed on the ballot as a candidate for the headship of a particular department and is elected by the people to take charge of that department. Much difference of opinion exists as to which of these two ways of distributing departments is preferable.<sup>1</sup>

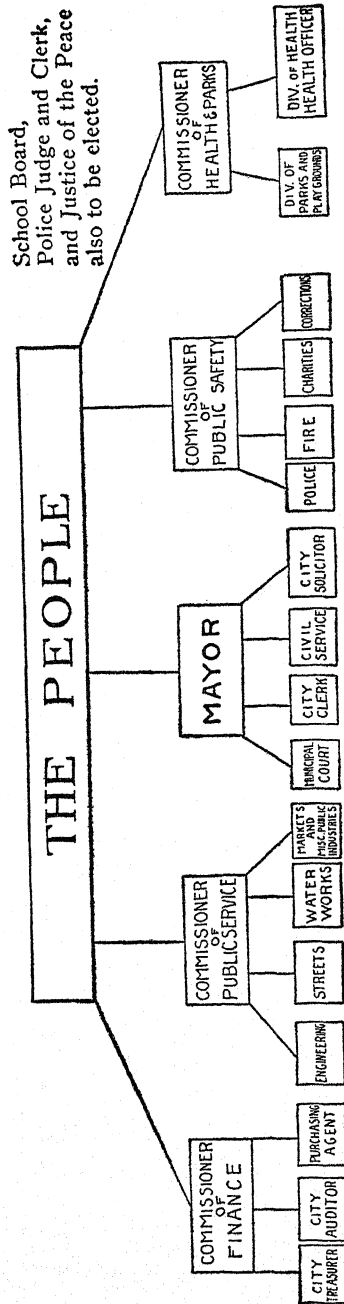
Variations  
in practice

In almost all cases, a mayor is still provided for. As a rule, he is elected directly to the office by popular vote, although in a few cities the commissioner who receives the highest popular vote automatically becomes mayor; in New Jersey and Nebraska, the commissioners select one of their own number. In any event, far from being the "too conspicuous and overburdened mayor" found in so many cities, he is little more than the first among equals. He wields no veto power; as mayor, he usually has no appointing power; he has no independent power of removal; he is the nominal head of the city government and acts as such on ceremonial occa-

The mayor  
under the  
commission  
form

<sup>1</sup> Under the Des Moines plan, there are the following departments: (1) public affairs, (2) accounts and finance, (3) public safety, (4) streets and public improvements, and (5) parks and public property. Since 1921, Des Moines has elected its commissioners to specific offices. See L. J. Johnson, "Commission Government for Cities: Election to Specific Offices v. Election at Random," *Nat. Mun. Rev.*, II, 661-663 (Oct., 1913).

# DES MOINES PLAN OF COMMISSION GOVERNMENT, APPLIED TO DAYTON



Courtesy of Dr. L. D. Upson

sions, but of actual authority he has little or no more than each of his colleagues.

The commission plan has much to commend it. It is, however, not satisfactory in all respects, and after trying it, perhaps ten per cent of cities adopting it have reverted to the mayor-council form. In the first place, there is often haziness as to the place which the commission is actually to fill in the conduct of the city's affairs. The differences of opinion, already alluded to, respecting the proper method of assigning commissioners to departments arise largely from the failure of the makers of commission-government laws to discern and clearly state the true functions of the commission in relation to the administrative work of the city. If it is clearly understood that the commission's function is to serve as a general supervisory body, each member simply overseeing in a general way the administration of the particular department to which he has been assigned, but leaving the detailed conduct of departmental affairs to permanently appointed and professional administrators, the assignment of departments can properly be left to the commission. If, on the other hand, it is assumed that each commissioner will devote most of his time to the business of his department, becoming its active superintendent and director,<sup>1</sup> the case for election to specific offices becomes much stronger.

Perhaps the most serious defect in commission government lies in the fact that it does not carry the concentration of authority and responsibility to its logical conclusion, but leaves them divided among the five persons who usually compose the commission. A five-headed administrative system, even supposing each head to be a real expert, makes the highest efficiency difficult, if not impossible, of attainment. Friction is certain to arise sooner or later, and from one cause if not from another. A single commissioner, for example, may stubbornly adhere to a policy of his own which is disapproved by his colleagues; or he may find himself forced by them to adopt a policy to which he is strongly opposed. What is lacking in all cities governed by the simple commission—and this is an inherent defect of the system—is an apex to the administration which will insure leadership, teamwork, and a proper degree

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Defects of  
the com-  
mission  
system:

1. Indef-  
initeness  
of function

2. Insuf-  
ficient con-  
centration  
of respon-  
sibility

<sup>1</sup> This appears to be both the theory and the practice in the great majority of commission-governed cities—at all events (1) where the commission-government law stipulates that members of the commission must devote a stated number of hours each day to their official duties; and (2) where large salaries are paid to members of the commission, *e.g.*, \$4,000-\$6,000 in Illinois cities with more than 40,000 population, \$7,000 in Birmingham, Ala., and \$6,000 for commissioners and \$12,000 for mayor in New Orleans.

# ELECTORATE

**CITY COMMISSION  
FIVE MEMBERS  
ELECTED BY THE PEOPLE**

**CLERK  
OF THE COMMISSION  
APPOINTED BY  
THE COMMISSION**

**CITY  
MANAGER  
APPOINTED BY  
THE COMMISSION**

**DEPARTMENT OF  
PUBLIC SAFETY**  
Director Appointed  
by City Manager

**DIVISION OF POLICE**  
Bureau of Police Protection  
Bureau of Detectives  
Bureau of Crime Prevention  
Bureau of Training School  
Bureau of Policewomen  
Bureau of Weights & Measures  
**DIVISION OF FIRE**  
Bureau of Fire Prevention  
Bureau of Hydrant Service  
Bureau of Warehouse  
Bureau of Fire Fighting  
**DIVISION OF BLDG. INSPECTION**  
Bureau of Building Inspection  
Bureau of Plumbing & Gas Insp.  
Bureau of Smoke Inspection  
Bureau of Electrical Insp.

**DEPARTMENT OF  
FINANCE**  
Director Appointed  
by City Manager

**DIVISION OF ACCOUNTING**  
Bureau of Licenses  
Bureau of Assessments  
**DIVISION OF RECEIPTS  
AND DISBURSEMENTS**  
**DIVISION OF PURCHASING**

**DEPARTMENT OF  
LAW**  
Director Appointed  
by City Manager

**DIVISION OF LEGISLATION**  
**DIVISION OF LITIGATION**  
**DIVISION OF ADVICE & OPINION**

**DEPARTMENT OF  
PUBLIC WELFARE**  
Director Appointed  
by City Manager

**OFFICE OF DIRECTOR**  
Bureau of Legal Aid  
Bureau of Free Employment  
Bureau of Charities  
**DIVISION OF HEALTH**  
Bureau of Medical Service  
Bureau of Laboratory  
Bureau of Sanitation  
Bureau of Food Inspection  
**DIVISION OF RECREATION**  
Bureau of Community Club  
**DIVISION OF CORRECTION**  
**DIVISION OF PARKS**

**CIVIL SERVICE  
COMMISSION**  
THREE MEMBERS APPOINTED  
BY THE COMMISSION

**DEPARTMENT OF  
PUBLIC SERVICE**  
Director Appointed  
by City Manager

**DIVISION OF ENGINEERING**  
Bureau of Sewer Maintenance  
Bureau of Street Lighting  
Bureau of Design & Construction  
**DIVISION OF STREETS**  
Bureau of Ash & Rub removal  
Bureau of Garbage removal  
Bureau of Street Cleaning  
Bureau of Street Repair  
Bureau of Bridge & Walk main.  
Bureau of Transportation  
**DIVISION OF WATER**  
Bureau of Revenue collection  
Bureau of Pumping & Drain.  
Bureau of Construction & main.  
**DIVISION OF LANDS & BLDGS.**  
Bureau of Lands & Buildings  
Bureau of Motor Vehicles  
Bureau of Markets

**COMMISSION -MANAGER ORGANIZATION - DAYTON, OHIO.**

Drawn by Detroit Bureau of Governmental Research, Inc.

Courtesy of the Macmillan Co.



of subordination—qualities which are as essential to efficient administration as is individual expertness.

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Another important, though incidental, defect of commission-government laws or charters is their stress, as a rule, upon the political, rather than the administrative, side of city government. Sections relating to nominations, primaries, forms of ballot, number and function of commissioners, and the initiative, referendum, and recall are apt to be very ample, while comparatively scant attention is given to administrative provisions which would be of the greatest help in bringing the business methods of the city up to the level of those of the best private business corporations. One seldom finds, for example, adequate provision for scientific budget-making, for modern methods of accounting and reporting, for centralized purchasing, or for numerous other important business details. The seriousness of these omissions appears when one remembers that most of the commission's work relates to matters of routine business, differing slightly, if at all, from the ordinary operations of any large business concern. In fact, the modern city is essentially a great business enterprise, combining with the primary governmental functions of protecting health, life, and property the work of a construction company, of a purveyor of water, of an accounting, auditing, and purchasing institution, and of the people's agent in dealing with public service corporations. For the proper and efficient handling of such business activities, commission government can no more spontaneously generate scientific business methods than can mayor-council government.

3. Over-  
stress of  
political  
aspects

In view of these shortcomings, one may well be surprised at the degree of success which the commission system has attained in most places where it has been tried. The explanation is to be found in certain very obvious merits which have repeatedly neutralized the system's inherent weaknesses. There is a marked simplification of governmental machinery in comparison with what is usually found in mayor-council cities; expeditious handling of city business is facilitated; the introduction of more business-like methods is encouraged, even though not ensured; the conspicuous position of, and large authority vested in, the commission have served in some instances to attract into the city's service men of higher caliber than were found in the old type of city council; the fusion of the taxing and appropriating powers in the same small group tends to produce greater care and circumspection in making appropriations and preventing departmental deficits. To these general advan-

Counter-  
balancing  
merits

tages might be added a long list of benefits which have appeared here and there in individual cities and under peculiar conditions. As a rule, an awakening of civic interest has accompanied the adoption of commission government and has contributed incalculably to its success. Indeed, it is often hard to apportion the credit for improved municipal conditions under the commission system, so much has been due to the awakening of civic consciousness and popular interest in city affairs, as well as to the improved governmental machinery; the latter alone cannot regenerate any city.

With a view to remedying the defects of the commission system, without sacrificing any of its main advantages, a modified form has been introduced under the designation of the commission-manager, council-manager—or simply the manager—system. The first large city to experiment with the new type was Dayton, Ohio, beginning in 1914. The system proving highly satisfactory there, it was soon taken up elsewhere, and in 1931 was in force, either by charter or by ordinance, in over four hundred cities,<sup>1</sup> including thirty-three with population between fifty thousand and one hundred thousand (1930), and eighteen with population in excess of the latter figure.<sup>2</sup> The manager plan is now authorized by law in at least thirty-six states.<sup>3</sup>

Under this scheme, the small popularly elected commission is retained, with all of the powers of the commission in an ordinary commission-governed city except in the domain of administration. It enacts the ordinances and regulations for the government of the city, levies taxes, votes appropriations, creates or abolishes departments, and investigates the financial transactions or the official acts of any officer or department. It serves, however, only as the legislative, policy-determining, and general supervisory body of the

<sup>1</sup> About one-third of these cities have less than 5,000 population. Among the few cities that have abandoned the manager plan are Hot Springs, Ark., Lawton, Okla., Waltham, Mass., Akron, Ohio, Santa Barbara, Cal., Albion and Dearborn, Mich., and Tampa, Fla. On Akron's brief experience with manager government, see *Nat. Mun. Rev.*, XI, 73-76 (Mar., 1922); *ibid.*, XI, 183-186 (July, 1922); and *ibid.*, XII, 639-640 (Nov., 1923). See A. W. Bromage, "Why Some Cities Have Abandoned Manager Charters," *Nat. Mun. Rev.*, XIX, 599-603, 761-766 (Sept., Nov., 1930).

<sup>2</sup> These include Cincinnati, Cleveland, Dayton, Fort Worth, Grand Rapids, Kansas City, Mo., Miami, Fla., Norfolk, Dallas, Oakland, and Rochester, N. Y. Indianapolis, in 1927, voted to adopt the commission-manager system, but in 1929 the state supreme court voided the election on technical grounds. See *Nat. Mun. Rev.*, XVIII, 659-660, 774 (Nov.-Dec., 1929). A complete list of manager cities, corrected to January 1, 1931, appears in *Public Management* (formerly *City Manager Magazine*), XIII, 3, 23-29 (Jan., 1931).

<sup>3</sup> Michigan, Florida, Texas, and California lead (1931) in the number of manager cities, with 44, 36, 35, and 34, respectively.

city; and its members, devoting only a portion of their time to the city's affairs, are paid but a nominal sum for their services.<sup>1</sup> Responsibility for the details of administration, which in commission-governed cities is shared by the commissioners, is imposed upon a single official, the manager, who is chosen by the commission and is directly and wholly responsible to that body. Thus in place of a five-headed administrative system, administration is centralized in one responsible official. At the same time, the system makes possible a greater degree of flexibility in the administrative organization. There is, for example, no need of compressing city activities into five or any other number of departments merely to satisfy the arbitrary requirement that there shall be only as many departments as there are commissioners.<sup>2</sup>

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Under this system, notwithstanding the ultimate lodgment of power and responsibility in the commission, the central figure in the city government is very clearly the manager; and to the end that the commission may secure the best manager available, choice is not restricted to a resident of the city.<sup>3</sup> Most of the city managers now in office in the larger cities began in comparatively small places in other states. Local politicians can be counted on to oppose this feature; but most citizens can appreciate the advantage of having a manager who has not been identified with any local political faction or organization. The commission ought also to be left free, and usually is, to fix the manager's salary; otherwise, the city may be prevented from obtaining a properly qualified person merely because of some charter provision regulating the amount of compensation. The manager is generally appointed for an indefinite term, and is therefore subject to removal by the commission at any time when he ceases to give satisfaction.<sup>4</sup>

Selection  
of the  
manager

<sup>1</sup> See H. M. Waite, "The Legislative Body in City Manager Government," *Nat. Mun. Rev.*, XII, 66-69 (Feb., 1923); A. R. Hatton, "Jackson and Its Manager," *ibid.*, IX, 164-167 (Mar., 1920); L. J. Johnson, "Two Forms of the City Manager Plan," *Amer. City*, XXXVII, 203-205 (Aug., 1927).

<sup>2</sup> In about three-fourths of the manager cities, the council does not exceed five members; in Kansas City it numbers eight, in Cincinnati nine, and in Cleveland twenty-five.

<sup>3</sup> There are a few exceptions, *e.g.*, Phoenix, Arizona. In practice, a "home man" has frequently been chosen manager, notably in Cleveland and Kansas City.

<sup>4</sup> A prospective manager usually insists that the commission execute a contract to employ him at a fixed salary for a definite period. But, even so, such an arrangement can be terminated by the commission at any time, subject to an adjustment with the manager concerning the unpaid balance of the stipulated salary. Managerial salaries, in 1930, ranged all the way from \$720 in Osborne, Pa., and \$1,200 in Devol, Okla., to \$10,000 in Phoenix, Ariz., Miami Beach, Fla., Berkeley and Sacramento, Cal., Wichita, Kan., Portland,

CHAP.  
XLIIIThe  
manager's  
functions

The powers and duties of the manager make him easily the most influential official in the city government, although his responsibility to the commission is always perfectly clear and absolutely direct; and the members of the commission are, in turn, subject to popular control through the initiative, referendum, and recall. The entire city administration revolves around the manager, who, like the centurion in the Bible, saith "to this man go and he goeth, and to another, come and he cometh." He appoints all heads of departments, and sometimes the deputy heads; he assigns to each his functions; and he may suspend or remove heads or subordinates at any time for cause. Minor employees are usually selected under a system of competitive examinations administered by a civil service commission of three members appointed by the commission. But the manager has general supervision over all of the work done in the various departments, and is held responsible for results. In fact, the greater part of his time is occupied with attending to the details of city administration.<sup>1</sup>

Next in importance, and closely related to these tasks, is the duty of keeping the commission informed on the city's financial condition, preparing the annual budget, and going over and explaining the significance of various items. Responsibility for the enactment of the budget rests, however, not with the manager, but with the commission representing the body of tax-payers. Finally, the manager is made the chief executive of the city for the enforcement of all municipal ordinances, and of such state laws as the city is expected to administer. There is still a mayor, to be sure, who is usually the commissioner receiving the greatest number of popular votes; but he has even less power than in ordinary commission cities, and in reality is little more than a figurehead.<sup>2</sup>

The manager has a right to be present at all meetings of the

Me., Fall River, Mass., Niagara Falls, N. Y., Hamilton, O., Knoxville, Tenn.; and Austin, Texas; \$12,000 in Winfield, Kan., Grand Rapids, and Pontiac, Mich., and Norfolk, Va.; \$12,500 in Charlotte, N. C.; \$13,500 in Oklahoma City, Okla.; \$15,000 in Kansas City, Mo.; \$16,500 in Fort Worth, Texas; \$20,000 in Rochester, N. Y.; and \$25,000 in Cleveland and Cincinnati.

<sup>1</sup> See C. W. Koerner, "Why There Should Be an Assistant City Manager," *Nat. Mun. Rev.*, XIII, 670-672 (Dec., 1924); H. W. Hepner, "The Qualifications of a City Manager," *ibid.*, XIII, 539-541 (Oct., 1924); E. D. Ellis, "The City Manager as a Leader of Policy," *ibid.*, XV, 201-204 (Apr., 1926); A. R. Hatton, "The Executive under Council-Manager Government," *Public Management*, XII, 321-323 (May, 1930).

<sup>2</sup> On the desirability of magnifying the office of mayor in the larger managerial cities, see J. W. Routh, "Thoughts on the Manager Plan," *ibid.*, XII, 176-180 (Apr., 1923). Cf. L. D. White, "Some Observations on the City Manager Plan," *Public Management*, IX, 222-229 (Mar., 1927).

commission, to take an active part in its deliberations, and to make recommendations to it, although he has no vote. Thus, legislation and administration, the money-raising and the money-spending branches of the government, are brought into close and open relationship with one another. Members of the commission are expected to refrain from meddling in roundabout ways with administrative activities, and from attempting to influence the manager in the selection of department heads and subordinates and in awarding city contracts. It must, however, be understood that manager government contains no automatic check upon this sort of thing. The members of the commission are always subject to some temptation to take a hand in administrative work, especially in filling subordinate appointive positions. Nothing but the establishment of sound traditions as to the proper sphere of activity of the commission, backed by a vigilant interest on the part of the citizens generally, can prevent a recurrence of undesirable councilmanic dabbling in administrative business.

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XLIII

The commission-manager or council-manager form of government is closely modeled upon the organization of large business corporations, with the electorate corresponding to the stockholders, the commission corresponding to the board of directors, chosen by the stockholders and charged with general responsibility for the conduct of the business, and the city manager corresponding to the president or general manager, chosen by the board of directors, responsible to them, and charged with looking after all the details of the business. The results achieved appear to have been more uniformly satisfactory than in commission-governed cities: expert administrators, or persons with administrative experience in private business, have usually been secured as managers; there has been a decided improvement in general administrative efficiency; modern business methods have been introduced; financial methods, in particular, have been noticeably toned up; and last, but by no means least, politics of the baser sort has thus far been largely eliminated from city administration. How long this last condition will continue, no one dares predict. In a few cities, the system of proportional representation in the council has undoubtedly contributed its share to better government; in addition, credit, as in the case of commission-governed cities, has to be divided between the improved governmental organization itself and an active and continuous interest in municipal affairs on the part of a greater proportion of citizens.

Results

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1928); 69-73 (Feb., 1928); *ibid.*, Supp., XVIII, 203-220 (Mar., 1929); 601-603 (Oct., 1929); *ibid.*, XIX, 155-157, 212 (Mar., 1930); *Amer. Polit. Sci. Rev.*, XXII, 372-377 (May, 1928); *ibid.*, XXIII, 732-735 (Aug., 1929); Dayton, *Nat. Mun. Rev.*, XII, 20-23 (Jan., 1923); *ibid.*, XIX, Supp., 497-518 (July, 1930); Durham, No. Car., *ibid.*, XIV, 476-480 (Aug., 1925); Grand Rapids, *ibid.*, XVIII, 428-429 (June, 1929); Greensboro, No. Car., *ibid.*, XVII, 114-115 (Feb., 1928); Indianapolis, *ibid.*, XVI, 555-557 (Sept., 1927); Kansas City, *ibid.*, XIV, 207-208. (Apr., 1925); 617-620 (Oct., 1925); Knoxville, *ibid.*, XIII, 611-617 (Nov., 1924); *Literary Digest*, LXXXIX, June 5, 1926, p. 18; Nashville, *Nat. Mun. Rev.*, X, 452-453 (Sept., 1921); Newport, R. I., *ibid.*, XVI, 172-176 (Mar., 1927); Pasadena, *ibid.*, XIV, 403-406 (July, 1925); 643 (Oct., 1925); Rochester, N. Y., *ibid.*, XV, 208-211 (Apr., 1926); Sandusky, O., *ibid.*, VIII, 679-685 (Dec., 1919); Stratford, Conn., *ibid.*, XIV, 82-85 (Feb., 1925); Watertown, N. Y., *ibid.*, XIX, 410-413 (June, 1930); Wichita, Kan., *ibid.*, IX, 275-279 (May, 1920).

## CHAPTER XLIV

### PROTECTIVE ACTIVITIES OF THE CITY

In preceding chapters, city government has been described with respect to its form or structure. We now turn to municipal functions and activities. Speaking broadly, these are the same, whatever the structure of the governmental system. And yet, organization and function are intimately related. For, after all, machinery is only a means to an end, namely, the proper performance, not only of the more obvious and primary functions of all governments—the protection of life and property—but also of all those varied business and social-welfare activities which vitally affect the daily life of citizens. Indeed, the greater part of the work of city government consists in serving as an agency for the satisfaction of a great variety of daily human wants which can be better met through public than through private means.

When entire volumes have been written on single phases of city activities, a brief chapter or two can, of course, give only the barest outline of the subject. No very satisfactory classification is possible, because many activities fall partly in one field and partly in another. But for convenience the city's organized efforts may be divided into five main groups, according as they relate to (1) protection of life and property, (2) public works, (3) social welfare, (4) education, and (5) finance. In the present chapter, we shall speak only of those activities which are comprised in the first of these classes; which means to confine attention to three great protective agencies, the police, fire, and health departments.

Municipal police forces vary in size from twenty or thirty patrolmen in cities of from ten to thirty thousand up to small armies of about 5,000 in Philadelphia, over 6,600 in Chicago, and over 18,500 in New York. Although legally officers of the state, and largely occupied with the enforcement of state laws, the police are practically everywhere organized, appointed, paid,<sup>1</sup> and controlled

<sup>1</sup> L. V. Harrison, "Expenditures for Police Service," *Nat. Mun. Rev.*, XVI, 638-642 (Oct., 1927); A. Vollmer, "Police Organization and Administration," *Public Management*, X, 140-151 (Mar., 1928); E. Crandall, "Sal-



by municipal authorities.<sup>1</sup> At the head of the police department one usually finds a single commissioner, called the police commissioner or the superintendent of police, who may be either a layman with little or no knowledge of police affairs when he assumes office or a professional member of the force who has risen from the ranks. Sometimes, however, police administration is placed in the hands of a small appointive bi-partisan board, especially in the smaller cities. This is about as unsatisfactory an arrangement as can be devised, since it divides responsibility, prevents prompt and energetic action, weakens discipline, and furnishes an opportunity for the entrance of all sorts of back-door influences.

Below the chief or head of the department are deputy chiefs in the larger cities, captains, lieutenants, sergeants, and patrolmen. The last constitute the great majority, and the backbone, of the force. Upon their efficiency largely depends the character of the entire police administration of the city. The force, thus organized along military lines, is apportioned to the various precincts of the city, in each of which there is often a station-house serving as police headquarters. Policewomen also are now found in New York, Chicago, Los Angeles, and about two hundred other cities. To them are assigned special duties connected with the supervision of dance halls, rest rooms in department stores and other public places, railway stations, and moving-picture theaters. Police matrons are also commonly found at police stations to care for women offenders.<sup>2</sup>

In every large city, the police department has numerous functions to perform; and this has led to the organization of specialized squads. First and most important of police duties is patrolling the streets, day and night, for the prevention of crime. For this work, not less than eighty per cent of the entire force ought to be available during any twenty-four-hour period.<sup>3</sup> When a crime has been

Specializa-  
tion of  
functions

aries of Policemen and Firemen in Thirty-five Cities," *Nat. Mun. Rev.*, XVII, 268-279 (May, 1928).

<sup>1</sup> In Boston, St. Louis, Kansas City, and Baltimore, the organization and control of the police force has for a good many years been vested in a single commissioner or a board appointed by the governor. Police affairs have likewise been administered by state boards at one time or another in other cities, notably New York and Chicago. But this arrangement is usually resented as a violation of the principle of home rule.

<sup>2</sup> M. E. Hamilton, *The Policewoman* (New York, 1924); C. Owings, *Women Police* (New York, 1926); L. Brownlow, "The Policewoman and the Woman Criminal," *Nat. Mun. Rev.*, XVI, 467-468 (July, 1927); "The Policewoman's Sphere," *ibid.*, XVII, 136-138 (Mar., 1928). Cf. *Public Personnel Studies*, V, 245-274 (Dec., 1927), "Functional Work of the Woman's Bureau of a Police Department and Tests for the Selection of Policewomen."

<sup>3</sup> Cf. C. McKinley, "Special Police Patrol in Portland, Oregon," *Nat. Mun. Rev.*, XVIII, 509-513 (Aug., 1929).

committed, and the perpetrator is unknown, a second police function comes into play, namely, the discovery and arrest of the criminal, and the collection of evidence relating to the offense. In a large city, this falls to detectives or plain-clothes men. Detective work may be assigned to a few regular patrolmen or sergeants in each police precinct; or it may be centralized in one office, called the detective bureau, and handled by men who devote their entire time to it. In large cities, too, one finds a mounted squad and a motorcycle squad to assist patrolmen in handling street traffic and exceptional throngs of people. Sometimes there is also a harbor squad to patrol the water-front in small boats. The department regularly has to look after the telephone patrol-boxes, and the flashlight and ambulance systems, which are essential in large cities; and it also sometimes has the care of the city jail, the granting of certain licenses, the canvassing of voting lists, and the enforcement of numerous and varied regulations issued by the health and fire departments. Crime prevention bureaus have also made their appearance. Such a bureau was established in New York City early in 1930, one branch dealing with boys and the other with girls; policewomen assigned to the latter are now known as crime prevention officers.<sup>1</sup>

Selection  
and train-  
ing of  
policemen

Appointments to the police force used to be distributed by the successful party or faction as rewards for the political services of ward leaders and other local politicians, in accordance with the well-known standards of the spoils system. Now, however, in most large cities, and happily in not a few smaller ones, this practice has been largely supplanted by a system of competitive examinations.<sup>2</sup> Where honestly administered, the merit plan has tended to reduce political favoritism and to improve the general character and efficiency of the service. Recognizing the need for special training for the proper performance of police duties in a large city, New York, Chicago, and more than a score of other municipalities, following the example of London, Vienna, and Paris, have organized training schools for newly appointed police recruits.<sup>3</sup> The

<sup>1</sup> A description of their work appears in the *N. Y. Times*, February 2, 1930.

<sup>2</sup> H. W. Marsh, "Civil Service and the Police," *Nat. Mun. Rev.*, X, 286-291 (May, 1921); E. M. Martin, "An Experiment in New Methods of Selecting Policemen," *ibid.*, XII, 671-681 (Nov., 1923). See also *ibid.*, XVI, 719-723 (Nov., 1927); F. Telford and F. A. Moss, "Suggested Tests for Patrolmen," *Public Personnel Studies*, II, 112-144 (July, 1924); *ibid.*, IV, 122-151 (Apr., 1926).

<sup>3</sup> C. F. Cahalane, *Police Practice and Procedure* (New York, 1914), and *The Policeman* (New York, 1923); "New York's New School for Criminal Catchers," *Literary Digest*, LXXXIII, Nov. 22, 1924, pp. 40 ff.; H. G. Schutt,

problems of police promotion and discipline, however, have not as yet found any very satisfactory solution.

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In no branch of city administration are there greater opportunities for corrupt influences to make themselves felt than in the police force of a large city. It is therefore something more than a mere coincidence that in practically every startling revelation of political corruption connected with city government the police force has been more or less deeply involved. "All the lawless elements of the city which derive profit from their respective trades are willing to share their ill-gotten gains with the police in return for protection" or immunity from prosecution.<sup>1</sup> The opportunities for corruption are especially great when the police are expected to enforce laws which do not reflect the sentiment or moral standards of the community, as in the case of laws prohibiting the sale of liquor, or requiring the Sunday-closing of stores, theatres, and other amusement places, and those prohibiting gambling and the social evil.<sup>2</sup>

The criminal courts must also be mentioned as essentially an integral part of the police system.<sup>3</sup> They are provided for either in the city charter or in the general state laws. The judges in these "police courts" are usually elected by popular vote, which in reality often means that their selection is determined largely by political bosses and organizations supported by elements which are ready to pay for immunity from the enforcement of the criminal laws. Because of unfortunate experiences of this nature, popular election has been abandoned in New York and some other cities,

Criminal  
courts and  
the police

"Advanced Police Methods in Berkeley," *Nat. Mun. Rev.*, XI, 80-85 (Mar., 1922). The New York police school, as reorganized in April, 1925, is called the "Police Academy," and is designed to be "the West Point of the Department." See *N. Y. Times*, April 22, 24, 25, 26, 1925. A noteworthy expansion of the school's curriculum took place recently under Commissioner Whalen. See *Nat. Mun. Rev.*, XIX, 394 (June, 1930).

<sup>1</sup> G. H. Putnam, "Conditions of Vice and Crime in New York and the Relation of These to the Police Force of the City," *Nat. Mun. Rev.*, II, 408-415 (July, 1915); O. H. P. Garrett, "Why They Cleaned Up Philadelphia," *New Republic*, XXXVIII, 11-14 (Feb. 27, 1924); A. F. Macdonald, "General Butler Cleans Up," *Nat. Mun. Rev.*, XIII, 367-373 (July, 1924); "General Butler's Dramatic Exit," *Literary Digest*, LXXXVIII, Jan. 9, 1926, pp. 10-11; B. Smith, "A Municipal Program for Combating Crime," *Nat. Mun. Rev.*, XVII, 33-39 (Jan., 1928); D. C. Stone, "Cincinnati Surveys its Police," *ibid.*, XVII, 157-162 (Mar., 1928); W. Matscheck, "Kansas City Studies its Police Department," *ibid.*, XVIII, 453-457 (July, 1929). Recent crime surveys for Cleveland, Missouri, and Illinois also throw light upon the police and corruption. For further references, see Chap. xxxvii above.

<sup>2</sup> R. B. Fosdick, *American Police Systems*, Chap. i.

<sup>3</sup> In addition to the police courts, the larger cities commonly have special municipal courts to handle civil cases.

and police magistrates are now appointed either by the mayor or the governor, with somewhat more satisfactory results.<sup>1</sup> The spirit and methods of the judges in the criminal or police courts have much to do with the effectiveness of police administration. "Magistrates with an academic knowledge of the law, and without an intimate acquaintance with the habits of criminals and the difficulty which policemen encounter in securing absolutely legal proof in all cases, may destroy the zeal of a force by allowing notorious criminals to escape on technical grounds." On the other hand, "a magistrate too closely in sympathy with the police force and incapable of taking a detached view may err on the side of bureaucracy and help to cultivate in the force a spirit of contempt for the rights of the citizen, particularly when the citizen happens to be a poor man. This aspect of judicial tyranny has been illustrated many times in the case of strikes, when peaceful picketers have been arrested on charges of 'disorderly conduct' and railroaded to the workhouse by intolerant judges."<sup>2</sup> The system of admitting to bail persons accused of serious crimes is often abused, so that it reacts unfavorably upon the vigilance with which the police run down and apprehend violators of the law.

Special  
courts

In the past two decades, noteworthy progress has been made in our cities in discriminating between various classes of offenders<sup>3</sup> and providing special courts for dealing with each class. For example, many, if not all, of our larger cities now have juvenile courts, under one name or another, for dealing with youthful offenders.<sup>4</sup> Some, like the juvenile court of Denver, formerly pre-

<sup>1</sup> A. M. Kales, "Methods of Selecting and Retiring Judges in a Metropolitan District," *Annals Amer. Acad. Polit. and Soc. Sci.*, LII, 1-12 (Mar., 1914); W. McAdoo, "The Administrative Reorganization of the Courts in New York City," *Acad. of Polit. Sci. Proceedings*, V, 198-216 (Apr., 1915). Detroit's criminal courts were reorganized in 1920; see *Nat. Mun. Rev.*, IX, 345-348 (June, 1920); *ibid.*, X, 550-553 (Nov., 1921). In San Francisco, between 1921 and 1930, the mayor nominated the police judges as vacancies arose or terms expired, and the voters approved or rejected these nominations at the next regular election. In 1921, a survey was made of the administration of criminal law in Cleveland. See Cleveland Foundation, *Criminal Justice in Cleveland* (Cleveland, 1921); R. Moley, "Civic Interest and Crime in Cleveland," *Nat. Mun. Rev.*, XII, 580-585 (Oct., 1923). Cf. E. H. Wilson, "London's Courts Compared with New York's," *Jour. Amer. Judic. Soc.*, XI, 118-119 (Dec., 1927).

<sup>2</sup> C. A. Beard, *American City Government*, 173-175; G. W. Alger, "The Police Judge and the Public," *Outlook*, XCVI, 356-364 (Oct. 15, 1910).

<sup>3</sup> G. Everson, "The Forgotten Army," *Outlook*, CXIX, 343-353 (June 26, 1918).

<sup>4</sup> T. D. Eliot, *The Juvenile Court and the Community* (New York, 1914); K. F. Lenroot and E. O. Lundberg, "Juvenile Courts at Work," U. S. Dept. of Labor, *Children's Bureau Publications*, No. 141 (Washington, 1925); H.

sided over by Judge Ben B. Lindsey, have attracted nation-wide attention. Then there are so-called morals courts for dealing with social vice, and domestic relations courts to which are brought persons charged with the non-support or abandonment of wives, children, or poor relations.<sup>1</sup> Speeders' courts, as the name implies, handle cases involving infractions of the ordinances regulating the driving of automobiles.

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Many a person arrested for a crime or misdemeanor has been found to be sub-normal, either mentally or physically, or both; and this sub-normality has a most important bearing upon the question of his responsibility and punishment. Such cases require special investigation and, after all the facts are known, special treatment. In some of our larger cities, the ascertainment of these facts has been assigned to psychopathic laboratories, institutes, or hospitals, which are proving to be valuable adjuncts to the criminal courts, especially in the case of sub-normal young persons.<sup>2</sup>

Psycho-  
pathic lab-  
oratories

In the matter of punishments also, especially of persons convicted of minor offenses, considerable progress has been made in the past few years.<sup>3</sup> The parole system, involving the release of prisoners on probation, has been widely adopted, with conspicuously good results in Indianapolis and some other cities, and with less satisfactory results in Chicago. Highly beneficial consequences have also come from the new practice of allowing court fines to be paid in instalments.<sup>4</sup> Finally, to supply the lack of suitable institutions for the detention of certain classes of offenders, farm colonies have been established by Los Angeles, Duluth, and other cities. Cleveland, for example, has a correctional farm for vagrants and a farm colony for boys and another for girls. "The purpose of these farms is to furnish a refuge where offenders may work out their

Punish-  
ments

H. Lou, *Juvenile Courts in the United States* (Chapel Hill, N. C., 1927); A. C. McLaughlin and A. B. Hart, *Cyclopedia of American Government*, I, 500-502; G. G. Battle, "The Newer Justice," *Rev. of Revs.*, LXVIII, 417-419 (Oct., 1923).

<sup>1</sup> C. W. Collins, "The Pittsburgh Morals Court," *Nat. Mun. Rev.*, X, 413-416 (Aug., 1921); G. E. Worthington, *The Women's Day Court of Manhattan and the Bronx* (New York, 1922); G. E. Worthington and R. Topping, *Specialized Courts Dealing with Sex Delinquency* (New York, 1925).

<sup>2</sup> M. N. Goodnow, "A New Public Servant—The Municipal Psychopathologist and his Task of Soul-Saving," *Nat. Mun. Rev.*, VIII, 306-311 (June, 1919).

<sup>3</sup> C. O. Sherrill, "Cincinnati's City Workhouse," *Nat. Mun. Rev.*, XVIII, 525-528 (Aug., 1929).

<sup>4</sup> L. and E. Stern, *A Friend at Court* (New York, 1923); J. A. Collins, "Probation—a Practical Help to the Delinquent," *Nat. Mun. Rev.*, IV, 217-223 (Apr., 1915); "Suggested Tests for Probation Officers," *Public Personnel Studies*, IV, 185-200 (June, 1926).

own salvation, living in the open air and paying their own way."<sup>1</sup>

Scarcely second in importance to the work of the police department is that of the fire department. Indeed, the functions of the two touch at several points, inasmuch as the police are frequently required to make the inspections which are necessary to the complete enforcement of many regulations laid down by the fire department. Not illogically, therefore, these two branches of municipal service are often brought together in a single administrative department presided over by a commissioner of public safety. In about two-thirds of the cities having a population of more than thirty thousand in 1917, the control of the fire department was vested in a single commissioner (whether or not combined with police administration), and for much the same reason that a single head is preferred to a board in the case of the police department. In the other third, the department was in charge of a board or of a committee of the city council.<sup>2</sup> A few decades ago, paid professional fire departments were to be found in only the largest cities; elsewhere, the work of fire-fighting was carried on by volunteer unpaid companies, consisting of men who were employed most of the time in other pursuits. Now all this is changed; the city, be it small or large, which is without its professional paid fire department is regarded as decidedly backward. In 219 cities of thirty thousand population in 1917, only 162 volunteer fire companies were reported by the census authorities, in comparison with 3,790 paid companies. Fire departments are regularly organized in small units or companies, which are stationed at different points throughout a city. In large cities, the companies in a district of considerable size are organized into battalions. In any case, at the head of the active fire-fighting force is the fire chief or fire marshal, who may or may not be the administrative head of the department.<sup>3</sup>

<sup>1</sup> Los Angeles, Portland (Ore.), and some other cities have appointed officials, called public defenders, who, at public expense, conduct the cases of accused persons who are too poor to employ legal counsel. See M. C. Goldman, *The Public Defender; a Necessary Factor in the Administration of Justice* (New York, 1917); W. J. Wood, "The Public Defender," *Rev. of Revs.*, LXI, 303-307 (Mar., 1920); E. L. Arfola, "Public Defender in the Police Courts," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXXVI, 146-151 (Mar., 1928). For further references, see p. 889, note 1, above.

<sup>2</sup> U. S. Census Bureau, *Statistics of Fire Departments in Cities, etc.* (1917).

<sup>3</sup> R. Adamson, "Fire Administration" [in New York City], *Acad. Polit. Sci. Proceedings*, V, 66-85 (Apr., 1915); M. C. Deshel, "Safeguarding Life and Property," *Outlook*, CXXIII, 298-301 (Nov. 12, 1919); N. Fuessle, "The New Fire Fighters," *ibid.*, CXXIX, 174-176 (Oct. 5, 1921); G. W. Booth, "Standards of Adequate Fire Protection," *Nat. Mun. Rev.*, XVI, 223-226, (Apr., 1927).

One naturally thinks of the fire department primarily in connection with its most conspicuous activity, namely, fire-fighting. In this line of work, the equipment, methods, and achievements of American fire departments far surpass those of any European city. Nevertheless, the annual fire loss in European cities is far less than in American cities. The reason is, chiefly, that in Europe greater stress has been laid upon measures designed to prevent the outbreak and spread of disastrous conflagrations than in the United States. There is, consequently, less need to spend large amounts of energy and money on the development of fire-fighting agencies. American cities, however, in the past few years, have been waking up to the truth of the old adage that an ounce of prevention is worth more than a pound of cure. Numerous cities now have separate bureaus of fire prevention, organized within the fire department.<sup>1</sup> Stricter building codes, supplemented by adequate inspection of buildings during construction, and by frequent surveys of conditions adjacent to buildings with a view to the discovery and removal of accumulations of rubbish and avoidance of careless and improper storage of explosives, are contributing in no small measure to the gradual reduction of our appalling fire losses. To render these forms of fire-prevention activity more effective, the fire department should be given some measure of police power, so that the department itself, without depending on the police force, can carry out regulations designed to safeguard life and property.

Popular interest in fire prevention is being stimulated. Prior to 1921, about half of the states observed a "fire-prevention day," often combined with a "clean-up day." In that year, President Harding inaugurated a nation-wide "fire-prevention week," selecting the week in which falls the anniversary of the great Chicago fire, October 9, 1871. On these occasions, and at other times as well, special and varied efforts are made to bring home to the public the magnitude of our annual fire loss as a nation and the precautionary measures that should be observed by all of us.<sup>2</sup> In Seattle, for example, lectures by carefully selected members of the fire department have been given to large numbers of school children; and in Yonkers, New York, a similar end has been attained by the

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Functions:

1. Fire-fighting

2. Fire prevention

<sup>1</sup> H. A. Stone, "Balancing Prevention with Fighting within the Fire Department," *Nat. Mun. Rev.*, XVIII, 82-86 (Feb., 1929); "Essentials of an Effective Fire Prevention Bureau," *ibid.*, 174-178 (Mar., 1929).

<sup>2</sup> P. Bugbee, "Getting Ready for a Local Observance of Fire-Prevention Week," *Amer. City*, XXIX, 276-282 (Sept., 1923). For recent developments in fire prevention, see *Amer. Year Book* (1928), pp. 141-143; (1929), pp. 109-112.

organization of the school children into fire-prevention leagues. Every progressive fire department also disseminates information, either through the newspapers or in special circulars, concerning ways of reducing fire hazards. As a result of these varied efforts, the public is gradually coming to realize that fire prevention is entitled to rank in importance with preventive medicine in promoting the public safety and welfare.<sup>1</sup>

Selection  
and train-  
ing of  
firemen

With these increasingly varied duties to perform, the members of the fire department obviously ought not to receive their appointment to a place on the city's pay-roll as a result of personal or political favoritism, but only after satisfactorily passing a competitive examination similar to that now usually required of candidates for police appointments.<sup>2</sup> Furthermore, after their appointment, new recruits should undergo a probationary period of instruction in the duties which they will be called upon to perform. Appreciating the importance of this training, New York, Chicago, and Pittsburgh have opened schools for firemen, where instruction is given in modern fire-fighting, including ladder and hose drills, rescue work, pulmotor applications, and the use of fire towers.

Health and  
sanitary  
department

Few, if any, municipal functions are of more importance than the work of the health and sanitary department.<sup>3</sup> Yet the amount of city money set aside for that department is nearly everywhere less than the amount granted for police and fire protection or for education.<sup>4</sup> Few departments are brought into close contact with as many other branches of the city government as is the department charged with protecting the public health. It is brought into relation with the bureau in control of water supply and purification, with the department or bureau in charge of garbage collection and disposal, with the sewerage and street cleaning departments, with

<sup>1</sup> A highly important, though little known, private institution devoted to testing both fire prevention and fire-fighting inventions and appliances is the underwriters' laboratories maintained in Chicago and a few other cities by the National Board of Fire Underwriters. See H. C. Brearley, *History of the National Board of Fire Underwriters* (New York, 1916), Chaps. xiv-xvi, and *A Symbol of Safety* (Garden City, N. Y., 1923).

<sup>2</sup> *Public Personnel Studies*, II, 226-234 (Oct., 1924), "Suggested Tests for Fire Fighters;" W. C. Beyer, "The Hire of Firemen and Policemen," *Annals Amer. Acad. Polit. and Soc. Sci.*, CXIII, 235-246 (May, 1924).

<sup>3</sup> In some cities, sanitary work, which partakes largely of engineering, has been assigned to a separate sanitary department or to the street department.

<sup>4</sup> New York City in recent years has been exceptionally generous in the support of public health activities. In 1924, for example, over fourteen per cent of the total budget went for health conservation. This was nearly half the amount appropriated for education and recreation, slightly in excess of the appropriation for police protection, and more than double the sum set aside for fire protection.



the police department in the enforcement of the sanitary code, and with the educational authorities, especially in the matter of medical and dental inspection of school children. Harmonious coöperation with all of these various bureaus and departments is, therefore, indispensable to the proper functioning of the health department—a condition which, unfortunately, by no means always exists.

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In commission-governed cities, health protection is usually combined with police and fire administration in the department of public safety; but elsewhere, especially in the larger places, there is a separate department of health, at the head of which a board or commission is more frequently found than in the case of the police and fire departments. In New York City, for example, health administration is in the hands of a composite board composed of the health commissioner,<sup>1</sup> who is the department's responsible head, the commissioner of hospitals, the commissioner of sanitation, and two other members appointed by the mayor. In Chicago and many other cities, on the other hand, the health department is presided over by a single commissioner, appointed by either the mayor or the city council. Many places, especially small or medium-sized cities and villages, do not employ full-time health officers, and such public health activities as are carried on are looked after by a physician who devotes most of his time to his private practice. Under these conditions, a real health department is, of course, practically nonexistent, and public health activities are apt to be of a very restricted sort.<sup>2</sup> Occasionally, two or three small cities lying close together, *e.g.*, La Salle, Peru, and Oglesby, Illinois, have combined to employ a full-time health officer and develop a joint health administration, to the great advantage of each community concerned. Such a policy ought to commend itself, not only to neighboring small cities, but to towns and villages as well.

Organiza-  
tion

Probably no health department is better organized, carries on a wider range of activities, and is more efficiently administered, than that of New York City.<sup>3</sup> Here the board of health enacts the sanitary code of the city, issues emergency health orders, and has very broad powers in all matters affecting the public health; on extraordinary occasions, it may even destroy property, imprison

Powers and  
activities  
of the  
New York  
health  
department

<sup>1</sup> The commissioner is appointed by the mayor. See C. E. McCombs, "Public Health and Private Investigations," *Nat. Mun. Rev.*, VII, 387-394 (July, 1918).

<sup>2</sup> M. N. Baker, "The Municipal Health Problem," *Nat. Mun. Rev.*, II, 200-209 (Apr., 1913).

<sup>3</sup> S. W. Wynne, "Healthy New York Can be Made More Healthy," *N. Y. Times*, Mar. 9, 1930.

persons, and forbid traffic and intercourse in order to check the spread of disease. Under the general supervision of the board of health, and under the direct control of the commissioner of health, are the following eight bureaus:

(1) The bureau of administration, which coördinates and supervises the activities of the other bureaus and serves as the medium of communication with other departments of the city government; (2) the bureau of records, which collects, preserves, and publishes vital statistics, conducts all other statistical work of the department, issues burial permits, registers all practicing physicians, and assists in the enforcement of child-labor and compulsory-school-attendance laws; (3) the sanitary bureau, which has general jurisdiction over sanitary conditions, investigates reported nuisances, controls slaughter-houses and livery stables, and makes a detailed sanitary survey of the entire city; (4) the bureau of preventable diseases, which is responsible for the registration, sanitary supervision, and necessary care of all cases of communicable diseases, the disinfecting of premises and goods, the holding of tuberculosis and other clinics, and the organization and distribution of a large staff of field nurses; (5) the bureau of child hygiene, which has general supervision and care of the health of infants and children (including medical inspection and physical examination of all school children), holds eye and dental clinics in the schools, and supervises infant milk stations, day nurseries, and all institutions caring for dependent children; (6) the bureau of food and drugs, which investigates and controls the food and drug supply of the city, and conducts not only the inspection of foodstuffs but also the sanitary inspection of the premises where foods are stored, handled, prepared, or sold, and inquires into the physical condition of persons who prepare or serve food in hotels, restaurants, and other public eating-places;<sup>1</sup> (7) the bureau of laboratories, which carries on varied forms of research work, maintains supply stations at drug stores throughout the city where physicians may obtain diphtheria antitoxin and vaccine, and makes scientific studies of such diseases as tuberculosis, diphtheria, cholera, and typhoid

<sup>1</sup> N. M. Reed, "Protecting the Food of the City," *Outlook*, CXXIV, 114-117 (Jan. 21, 1920); W. W. Rogers, "Guarding the Health of the People," *ibid.*, CXXIV, 424-427 (Mar. 10, 1920); "Need of Municipal Meat Inspection," *Nat. Mun. Rev.*, IX, 189 (Mar., 1920); E. Weil, "Guarding New York's Food is a Huge Task," *N. Y. Times* (Aug. 1, 1926); J. W. Harrington, "New York Milk Inspection is a Huge Task," *ibid.* (Oct. 31, 1926); W. Sammis, "Vast River of Milk Flows Daily to City," *ibid.* (Oct. 9, 1927); W. P. Hedden, *How Great Cities Are Fed* (New York, 1930).

fever, and devises modes of combating them; and (8) the bureau of public health education—one of the most recent and important divisions of the department—which has charge of the dissemination of information concerning the health of the community, the securing of better coöperation between the department officials and the public, the publication of health literature, including weekly and monthly bulletins for the information of physicians, the giving of health lectures to city employees and the public, the organizing of exhibitions and moving-picture shows, and not a few other activities.<sup>1</sup> In 1928, the health department was relieved of some of its responsibilities by the creation of a new department of hospitals to have jurisdiction over the hospitals, ambulance service, and certain other activities of the health and public welfare departments.<sup>2</sup>

This summary will serve to give some idea of the great variety of functions that may fall to the lot of a health department in any large city. Many of the activities noted are not carried on at all in some cities, either by the health department or by any other branch; on the other hand, the health department is sometimes made responsible for the cleaning of streets and alleys, for tenement house inspection, and for other activities which in New York are assigned elsewhere.<sup>3</sup> The summary also brings out forcibly the fact that, whereas formerly the work of the health department consisted almost wholly in discovering and abating nuisances and in fighting epidemics that might have been prevented, effort nowadays runs chiefly along the lines of preventive medical or sanitary science. "Health departments, properly equipped and based on correct principles . . . are veritable armies waging war on the causes of disease, no matter how subtle or remote they may be, no matter whether lurking in the home, the school, or the workshop."

Emphasis  
on pre-  
ventive  
measures

<sup>1</sup> *Municipal Year-Book of the City of New York* (1916), 208-209. To the health department in Chicago, the abatement of smoke and noise nuisances has recently been assigned. On the smoke nuisance, see *Nat. Mun. Rev.*, V, 299-303 (Apr., 1916); *ibid.*, XII, 111-113 (Mar., 1923); *ibid.*, XV, 270-276 (May, 1926). On the noise nuisance, see *ibid.*, IV, 231-237 (Apr., 1915); *ibid.*, VIII, 557-561 (Oct., 1919); *ibid.*, XI, 326-332 (Oct., 1922); S. W. Wynne, "Noises that Assail the New York Ear," *N. Y. Times* (Nov. 3, 1929); *ibid.* (Aug. 3, 1930).

<sup>2</sup> C. E. McCombs, "Consolidation of New York City's Hospitals," *Nat. Mun. Rev.*, XVIII, 451-453 (July, 1929).

<sup>3</sup> Since 1929, New York City has had a new department of sanitation (headed by a board), which has charge of the sewerage and street-cleaning systems of Greater New York. Tenement house inspection is assigned to a tenement house department.

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## CHAPTER XLV

### OTHER MUNICIPAL ACTIVITIES—CITY FINANCE

The preceding chapter sketched the principal city activities which spring from the primary function of all government, the protection of life and property. Many activities of the modern city, however, have little or nothing to do with the citizen's protection and involve the exercise of powers which are neither necessary nor peculiar to government as such. They are, rather, engineering, commercial, or social enterprises—undertakings such as might be, indeed often have been, carried on by private persons or corporations. To some of them, and to the subject of municipal finance, the present chapter will be devoted.

A city's engineering activities are commonly grouped in a single department of public works, although in many instances they are distributed among several departments. At the head of the department of public works one rarely finds a board or a commission, as in the case of health and education departments, but almost invariably a single commissioner. He is often a person with some engineering experience, although this is not absolutely essential if his subordinates include properly trained engineers and other technical experts. But under any circumstances, the headship of the department of public works in a city of considerable size calls for a man of large administrative ability and business experience.<sup>1</sup>

Public  
works:

The most common forms of municipal public works in this country have to do with the water supply, the city's wastes, and the city's streets. First in importance comes the provision of an adequate water supply for domestic and industrial purposes. The storing and distribution of water is primarily an engineering enterprise, but one which in the great majority of cities has been made a municipal, rather than a private, business because of the intimate relation which the water supply bears to the health of the community and to the efficiency of its fire department. It is also one of the most remunerative of the city's enterprises, and is therefore

1. Water  
supply

<sup>1</sup> Cf. C. A. Howland, "Municipal Expenditures for Public Works," *Nat. Mun. Rev.*, XVI, 580-586 (Sept., 1927).

often made to contribute to the support of other activities of the city government. Sometimes an adequate supply can be obtained only, or at all events, most satisfactorily, at a distance of a hundred miles or more, entailing the construction of elaborate and costly engineering works, as in the case of New York,<sup>1</sup> San Francisco, and Los Angeles. Even so, the service can usually be made to pay for itself in a reasonable time, and thenceforth to yield a net revenue.

In many places, the water supply, in its natural condition, is so turbid or muddy, or so impure, or both, as to require special treatment before being used for domestic purposes. To eliminate turbidity, water is often stored in huge reservoirs or tanks where sedimentation is hastened by the introduction of quantities of alum. To sterilize water and thus destroy most of the harmful bacteria in it, liquid chlorine gas is in common use, being injected frequently and in carefully measured quantities. To remove, not merely to kill, noxious bacteria, filtration plants have been introduced rapidly in many of our larger cities. The removal in this way of practically all disease-breeding bacteria has usually been reflected almost immediately in a lowered death-rate from typhoid fever. Two kinds of filters are in common use, the slow sand-filter and the rapid sand-filter; both are based on the same principle, namely, the removal of impurities by forcing the water slowly, and at a carefully regulated rate, through several successive layers of gravel and sand.<sup>2</sup> The largest slow sand-filters are at Albany, Philadelphia, Pittsburgh, and Washington. The Philadelphia filters constitute the largest plant of the kind in the world, and have a capacity of four hundred million gallons daily. Rapid sand-filters are better suited to the needs of cities whose water is turbid at certain seasons of the year, and are therefore more commonly found in the Middle West, the largest being at Cincinnati and Columbus, Ohio.

The collection and disposal of wastes is everywhere an important municipal activity, although far more is undertaken in this matter in some cities than in others. Few people appreciate the

2. Waste  
collection  
and  
disposal

<sup>1</sup> On the New York-Catskill system, see J. L. Stockton, "The City's Water Supply," *Outlook*, CXCI, 182-188 (Oct. 1, 1919); A. Meland, "New York's Great Water Project is Finished," *N. Y. Times* (July 11, 1926); W. W. Brush, "Has the Catskill Water Supply System . . . Fulfilled Expectations," *Nat. Mun. Rev.*, XVI, 159-163 (Mar., 1927).

<sup>2</sup> M. F. Stein, "How Filtration Plants Work," *American City*, XIII, 233-237 (Sept., 1915); G. A. Johnson, *Purification of Public Water Systems* (Washington, 1913); A. Hazen, *Clean Water and How to Get It* (2nd ed., New York, 1914); J. W. Ellms, *Water Purification* (New York, 1917); W. Garnett, *Water Supply* (New York, 1922).

fact that, counting all kinds, a city's wastes exceed a ton a day per capita. In every city of some importance, the problem of their collection and disposal is, therefore, one of serious magnitude.<sup>1</sup>

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There are five principal forms of municipal waste, namely, Garbage ashes, inorganic rubbish, street sweepings, garbage, and sewage. The collection and disposal of the first three present no serious difficulties, and are often left to private individuals or concerns. Garbage and sewage, on the other hand, offer problems of much seriousness and importance. Garbage consists chiefly of the kitchen wastes from hotels, restaurants, and private dwellings, and hence materials in which putrefaction early sets in and which soon become offensive, if not actually dangerous to health.<sup>2</sup> Garbage collection is in some cities wholly a municipal undertaking; in others it is left to private parties; while in still other cases a combination of the two methods is found. Similarly, the waste is disposed of in a variety of ways. Some cities, *e.g.*, Denver and Omaha, own hog-farms or piggeries on which the animals are fed the city garbage. Others, as Milwaukee, Minneapolis, and Memphis, have incineration plants where garbage is burned, either along with rubbish or separately. In recent years, garbage reduction plants have come into favor in Chicago and elsewhere, the oils and fats being extracted for commercial use in the form of soaps and axle-grease, leaving a residue which is salable as a fertilizer.<sup>3</sup>

Sewage consists primarily of water-borne human effluvia from dwellings and wastes from many industrial plants such as laundries and slaughter-houses. More than other forms of waste, this bears the germs of disease, and its proper collection and disposal become of prime concern to the health of the community. One of the earliest and most important of municipal engineering activi-

<sup>1</sup> G. C. Whipple, "The Broadening Science of Sanitation," *Atlantic Monthly*, CXIII, 630-641 (May, 1914).

<sup>2</sup> See M. N. Baker, "Garbage and Refuse Disposal a Matter of Cleansing Rather Than Health," *Nat. Mun. Rev.*, XIII, 675-678 (Dec., 1924).

<sup>3</sup> For recent developments connected with waste or refuse collection and disposal, see Brooklyn Chamber of Commerce, *Collection and Disposal of Municipal Waste in New York City* (pamphlet, 1919); J. C. Young, "City Faces a Crisis over Disposal of Waste," *N. Y. Times*, Mar. 13, 1927; G. A. Soper, "City Faces Reforms in Refuse Disposal," *N. Y. Times*, Mar. 17, 1929; V. Pope, "A New Sanitary System Awaits Voters' Decision," *N. Y. Times*, Oct. 20, 1929; *Outlook*, CXXIV, 67-71 (Jan. 14, 1920); St. Louis, *Amer. City*, XXIX, 265-267 (Sept., 1923); *Nat. Mun. Rev.*, XIV, 48 (Jan., 1925); New Orleans, *Nat. Mun. Rev.*, XII, 39-40 (Jan., 1923); Buffalo, *ibid.*, XII, 733-734 (Dec., 1923); Seattle, *ibid.*, XII, 152 (Mar., 1923); Indianapolis, *ibid.*, VIII, 391 (July, 1919); *ibid.*, XIII, 657 (Nov., 1924); Paterson, N. J., *ibid.*, XII, 208-209 (Apr., 1923); Boston, *ibid.*, XII, 393-394 (July, 1923); Washington, *ibid.*, XIII, 583-584 (Oct., 1924).

ties is, therefore, the installation, operation, and maintenance of an adequate sewerage system, consisting of trunk lines, lateral branches, and connections for each building used as a dwelling or for commercial or industrial purposes. In many cities, the problem is not solved with the construction of the sewerage system, the chief purpose of which is to collect sewage and carry it off; there remains the question of final disposal. In cities on the ocean or large lakes or rivers, this problem of disposal may find ready solution. But where the same lake or river serves as the source of water supply for other communities, different methods of disposal have to be found, or the sewage must be subjected to special treatment before it is turned into the lake or stream in question. Following the example of some European cities, Pasadena and Salt Lake City have large sewage farms upon which the sewage is allowed to flow, serving the purpose of irrigation in the cultivation of fruit and vegetables. Other cities, *e.g.*, Worcester and Providence, use large sedimentation basins or tanks for the separation of the solid matter from the water before the latter is turned into a water-course. Still other methods of sewage treatment which have been introduced rapidly in the past few years are the intermittent sand-filtration process, the percolating or sprinkling-filter system, contact beds, and especially the activated sludge process, which is now being used extensively in Milwaukee, Chicago, and other cities.<sup>1</sup>

## J. Streets

Within the jurisdiction of the department of public works, when not assigned to a separate department of streets, as is sometimes the case in large cities, falls the work of planning the width and direction of city streets, making the necessary surveys, curbing, paving, cleaning, repairing, sprinkling, and lighting the streets, and laying sidewalks. Enormous progress has been made during the past few years in street paving and cleaning<sup>2</sup> and lighting.

<sup>1</sup> See W. B. Fuller, "Sewage Disposal by the Activated Sludge Process," *Amer. City*, XIV, 78-81 (Jan., 1916). On the activated sludge process in Milwaukee, see *ibid.*, XVIII, 1-4, 114-119, 199-203 (Jan.-Mar., 1918); in Chicago, *Nat. Mun. Rev.*, XIII, 239-240 (Apr., 1924); Trustees of the Sanitary District of Chicago, *Memorandum Concerning the Drainage and Sewerage Conditions in Chicago* . . . (Chicago, 1923), 15-23; W. A. Bassett, "Chicago's Sewage Disposal Dilemma," *Nat. Mun. Rev.*, XIV, 266-267 (Apr., 1925).

<sup>2</sup> See C. Aronovici, "Municipal Street Cleaning and Its Problems," *Nat. Mun. Rev.*, I, 218-225 (Apr., 1912); "The Snow Removal Problem in American Cities," *Amer. City*, XXIX, 347-353, 479-482 (Oct.-Nov., 1923). On traffic problems, see M. McClintock, *Street Traffic Control* (New York, 1925); *Annals Amer. Acad. Polit. and Soc. Sci.*, CXXXIII, 1-249 (Sept., 1927), series of articles on "Planning for Street Traffic"; L. D. Upson, *Practice of Municipal Administration*, Chap. XX; H. S. Buttonheim, "Have Our Cities Fallen Down on Their Traffic Job?," *Nat. Mun. Rev.*, XVI, 755-761 (Dec., 1927); G. G. Hulse, "Chicago's Disposition of Street Traffic Violations," *ibid.*, XVI, 498-



One seldom comes across a city nowadays, no matter how small, in which at least the principal streets are not paved, and in which all are not lighted by either gas or electricity. Brick and wooden blocks for retail business and residential streets have practically displaced the macadam of a former generation; in the residential and boulevard sections, miles of concrete or asphalt roadway are to be found in every city of considerable size; while in the heavy traffic sections, granite blocks are often employed. In the majority of cities, street lighting is not carried on directly by the municipality, but is done by private corporations under contract. Nevertheless, there has been a noteworthy increase in the number of cities owning and operating their electric lighting plants for street and commercial purposes, although the same cannot be said with respect to gas-works.

Other activities included in the term "public works" are the erection and maintenance of the city hall and other buildings owned by the city, the construction and care of bridges, and in some places the care and upkeep of parks, playgrounds, and cemeteries, and the operation of municipal markets and transportation systems. In carrying on the varied enterprises mentioned, every city is called upon to decide whether it will lay the sewers, pave, repair, and clean the streets, and erect public buildings with its own labor force and materials, or whether it will let out the work on contract to be done by private parties under carefully specified conditions. Each system has its advantages and its disadvantages; and experience shows that in some kinds of work the direct plan is quite satisfactory, while in others the contract system yields better results.<sup>1</sup> In many cities, both systems are in use. The construction of the great majority of public works is, however, done under the contract form. It is not difficult to see why "machine" politicians are especially eager to obtain control of the department of public works. By so doing, they are in a better position to secure lucrative contracts for their friends and paying employment for their humbler political followers. Philadelphia, for example, has long suffered from the pernicious influence of city contractors in municipal politics.<sup>2</sup>

Direct or  
contract  
work

502 (Aug., 1927); C. W. Stark, "The Model Municipal Traffic Ordinance," *ibid.*, XVII, 684-689 (Nov., 1928).

<sup>1</sup> The two methods are compared in W. B. Munro, *Municipal Government and Administration*, II, Chap. xxv; *Nat. Mun. Rev.*, XIII, 241-243 (Apr., 1924).

<sup>2</sup> See J. W. Follin, "Municipal Street Cleaning Wins in Philadelphia," *Nat. Mun. Rev.*, X, 272-273 (May, 1921); Philadelphia Bureau of Municipal

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XLVSocial-  
welfare  
activities

Municipal functions which, for want of a better classification, may be lumped together as social-welfare activities, have increased astonishingly, in both number and variety, during the past twenty years. Practically every city, however small, carries on at least two or three such activities, and in our larger cities the number is almost legion. A score or two of cities have, since 1908, formally recognized the importance of this branch of municipal activity by creating, under one name or another, departments or bureaus of social welfare. Among such cities are Dayton, Chicago, Kansas City, Los Angeles, Indianapolis, St. Louis, Minneapolis, Springfield (Mass.), Philadelphia, and New York. These departments or bureaus of social welfare have taken over many phases of philanthropic or charitable work previously performed by private individuals or unofficial organizations, but with which they are unable to deal adequately. The municipalization of such activities has grown out of the increasing realization that society at large should regard the defective, delinquent, and otherwise handicapped classes in the city as, in a sense, the wards of the community, and should therefore provide, through governmental machinery, ways and means of promoting their physical, moral, and economic welfare. The development is based on the belief that it is just as much the duty of a city to concern itself with the special problems of human life, of community efficiency and betterment, as to concern itself with questions of police and fire and health protection, garbage and sewage disposal, and education.<sup>1</sup>

## Scope

The multifold character of welfare work—which may or may not be carried on under a formally organized welfare department—may be seen from the following list of more or less common welfare activities and agencies: the establishment of free employment bureaus; the relief of poverty and other forms of individual and family distress; investigation and prosecution of “loan sharks”

Research, *Municipal Street Cleaning in Philadelphia* (pamphlet, 1924), summarized in *Nat. Mun. Rev.*, XIII, 653-654 (Nov., 1924).

<sup>1</sup> See M. K. Simkhovitch, “The City’s Care of the Needy; a Program for a Department of Charities,” *Nat. Mun. Rev.*, VI, 255-262 (Mar., 1917); A. T. Burns, “Private and Public Welfare Activities,” *ibid.*, VI, 263-268 (Mar., 1917); H. C. Carbaugh, *Human Welfare Activities in Chicago* (Chicago, 1917); B. Schwartz, “Baltimore Adopts New Conception of Public Welfare,” *Nat. Mun. Rev.*, XII, 7-8 (Jan., 1923); C. E. McCombs, “Charleston Breaks with the Past in Welfare Work,” *Nat. Mun. Rev.*, XIII, 341-349 (June, 1924); R. W. Kelso, “Public Welfare! Whose Responsibility?,” *ibid.*, XIV, 233-239 (Apr., 1925); E. S. Brownlow, “Coördination of Social Work in Knoxville,” *ibid.*, XIV, 300-306 (May, 1925); L. E. Bowman, “Public and Private Provision for Social Service in New York City,” *ibid.*, XIV, 483-490 (Aug., 1925). On welfare administration in St. Paul, see *ibid.*, XVIII, 497-499 (Aug., 1929).

who prey upon the poor;<sup>1</sup> granting mothers' pensions;<sup>2</sup> giving legal aid to those who are too poor to employ a lawyer; maintaining infant milk stations, day nurseries, and child-welfare stations;<sup>3</sup> employing a staff of visiting nurses to give instruction and care in maternity cases; instructing the children of the poor, and, through them, their parents, how to improve the home and reduce the cost of living; establishing municipal lodging-houses and municipal tenements; providing properly chaperoned dance-halls and other forms of indoor entertainment;<sup>4</sup> conducting manual training, vocational, and "Americanization" classes; creating insurance and loan-savings institutions; interesting children in gardening; providing free public baths and public laundries; organizing folk dances and neighborhood and community pageants;<sup>5</sup> and conducting investigations and researches into important sociological problems such as the causes, extent, and remedies for poverty, disease, and juvenile delinquency. The establishment and maintenance of parks and playgrounds have long been recognized as legitimate municipal activities in all our larger cities; but the number of small parks and playgrounds and neighborhood centers, with their varied opportunities for both indoor and outdoor recreation, have been greatly multiplied in recent years in cities of all sizes. With this development has also come the systematic supervision of games of all sorts and of field athletic sports by competent playground leaders.<sup>6</sup> Long as the list may seem, it by no means includes all of the welfare activities now carried on in American cities; nor does it include numerous other important municipal activities carried on by European cities, whence, indeed, has come

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<sup>1</sup> Chicago Department of Public Welfare, *Bulletin* I, No. 4 (1916), "The Loan Shark in Chicago."

<sup>2</sup> L. Jones, "City Mothers' Bureau of Los Angeles," *Nat. Mun. Rev.*, IX, 484-488 (Aug., 1920).

<sup>3</sup> A. L. Strong, "Child Welfare Exhibits," *Nat. Mun. Rev.*, I, 248-252 (Apr., 1912).

<sup>4</sup> F. Rex, "Municipal Dance Halls," *Nat. Mun. Rev.*, IV, 413-419 (July, 1915).

<sup>5</sup> M. G. Tierney, "The St. Louis Municipal Outdoor Theater," *Nat. Mun. Rev.*, XI, 128-130 (May, 1922).

<sup>6</sup> G. A. Bellamy, "New Visions in Public Recreation," *Nat. Mun. Rev.*, VIII, 229-234 (May, 1919); G. Fox, "Recreation—A Part of the City's Job," *Nat. Mun. Rev.*, X, 423-427 (Aug., 1921); W. T. Wood, "Crime Prevention Through Recreation," *ibid.*, XIII, 191-194 (Apr., 1924); F. R. McNinch, "Twelve Month Recreation," *ibid.*, XIII, 261-263 (May, 1924); E. E. Smith, "Public Provision for Recreation" [in New York City], *Outlook*, CXXIII, 508-510 (Dec. 17, 1919); W. Pangburn, "Municipal Sports in the United States," *Nat. Mun. Rev.*, XIV, 651-658 (Nov., 1925), and "Tendencies in Public Recreation," *ibid.*, XV, 514-518 (Sept., 1926).

much of the inspiration for this sort of work in the United States.

Educational activities are among the oldest of municipal functions in the United States. Like towns and villages, cities are given large freedom in organizing their public school system and in raising money for its support; and few activities have been more generously upheld. As a rule, school affairs are not directly under the control of either the council or the administrative departments, but are placed under the more or less separate and independent jurisdiction of a school board or committee, or a board of education. Exceptions to this practice are to be found chiefly in some of the commission-governed cities. Formerly, school boards of over forty members were in existence;<sup>1</sup> but the recent tendency has been in the direction of smaller boards, and they now range from three members in Albany to eleven in Chicago and Detroit, twelve in St. Louis, fifteen in Pittsburgh and Philadelphia, and seventeen in Providence. Members are chosen in a variety of ways, the two most common being popular election, as in Boston and Cleveland, and appointment by the mayor, as in New York and Chicago. In other cities, especially in the South, the board is appointed either by the city council or by the courts.<sup>2</sup> Terms of office vary from one year in some of the smaller cities to six and seven years in St. Louis and San Francisco, respectively; two years is perhaps the most common period. The tendency is to lengthen the term and to reëlect members who are willing to serve a second or third term. In the great majority of cities, the members serve without pay, although in San Francisco and Rochester they receive compensation.

Upon these school boards is placed the responsibility for the administration of the entire public school system. They attend to the selection and purchase of land and buildings for school purposes, and pass upon plans and specifications and let contracts for the construction of buildings; they provide the necessary fuel and

<sup>1</sup> In New York, for example, the board of education until recently consisted of forty-six members, appointed by the mayor for a five-year term. At present, the board consists of seven members, serving without pay. For reductions in other cities, see W. B. Munro, *Municipal Government and Administration*, II, 332 n.; B. M. Watson, "Tendencies in City School Board Organization," *Nat. Mun. Rev.*, VII, 58-61 (Jan., 1918).

<sup>2</sup> In San Francisco, a charter amendment, adopted in November, 1920, enlarged the school board from four to seven members serving seven-year terms, and provided a new method of selection. The mayor nominates members for the board at least sixty days before the regular city election, and at the election the voters approve or reject his nominations. In case of rejection, the mayor makes a new temporary appointment until the next election.

other supplies and janitor services; they are the custodians of all school property; they determine many points connected with the educational policy of the city; they estimate the sums needed for educational purposes each year, and either ask the city council for the amount or, if their authority permits, make a direct tax levy; finally, they appoint the school superintendent and have more or less to say in the appointment, promotion, and transfer of teachers. The superintendent is the responsible expert executive directly in charge of the educational activities of the schools. He, therefore, holds a position in relation to the school board very closely analogous to that held by the city manager under the commission or council in cities having managerial government.<sup>1</sup>

The past ten or twenty years have witnessed a remarkable expansion in the educational and allied activities of American cities. These now include medical, dental, and psychopathic examination of school children; special classes for children found to be mentally or physically defective; evening classes for immigrants and illiterates; vocational guidance, including manual training, domestic science, and commercial courses; the operation of low-priced or free lunchrooms for school children; and numerous other activities. Many persons now in early middle life can remember when few, if any, schoolhouses were ever used outside of school hours; indeed few schoolhouses were lighted in any way for use after dark, and their use for political purposes was simply unthinkable; while within the sacred precincts of the school yard no one was permitted to loiter after the close of school in the afternoon. Now all this has been changed in a hundred or more cities; schoolhouses are lighted with gas or electricity, and thus are made available for evening lectures and entertainments and as centers of neighborhood sociability; the school yard has been enlarged and transformed into a general public playground equipped with special apparatus, to which the children of the neighborhood are not only permitted, but urged, to resort at any time outside of school hours. Moreover, hundreds of schoolhouses throughout the country are now used as polling-places on election day,<sup>2</sup> and even some of the so-called conservative New England states permit public meetings,

Expansion  
of educa-  
tional  
activities

<sup>1</sup> W. McAndrew, "Why and How the Public Manages Schools," *Outlook*, CXXIV, 651-655, 707-713 (Apr. 14, 21, 1920). These articles describe the system in New York City. Cf. H. P. Smith, "Business Administration; a Weak Spot in Our City Schools," *Nat. Mun. Rev.*, XIX, 172-180 (Mar., 1930).

<sup>2</sup> L. H. Pink, "Polling Places in the Schools," *Nat. Mun. Rev.*, II, 451-455 (July, 1913); "Democratizing the Schoolhouse," *ibid.*, VIII, 594 (Nov., 1919). In New York City, 519 school buildings were used as polling places in 1923.

including political gatherings during electoral campaigns, to be held in them.

To carry on these manifold activities, and to meet the steadily increasing demands which are being made upon all of our city governments, the collection and expenditure of immense sums of money are required.<sup>1</sup> New York City's budget for 1931 amounted to almost \$621,000,000, a sum nearly equal to the combined amounts spent in 1928 by the twenty New England, Middle Atlantic, South Atlantic, and Pacific Coast states for the operation and maintenance of the general departments of their state governments.<sup>2</sup> Partly because of these increasing demands upon the city's exchequer, and partly because the cost of living for governments as well as for individuals has increased enormously during the past few years, many cities are now finding it extremely difficult to raise the necessary funds to carry on present activities—to say nothing of taking on new functions—without resorting to burdensome taxation. This is especially true of some of the largest cities, which hitherto derived a very considerable share of their revenue from liquor licenses—a source which suddenly dried up after the enactment of the eighteenth amendment to the national constitution.

The principal sources of municipal revenue are: (1) direct taxes on real and personal property, which now furnish by far the largest part of the revenue of every American city, the rate of the tax being fixed by the city council or commission and limited in many states by constitutional or statutory provisions; (2) taxes derived from public service corporations, such as street railways, gas and electric lighting companies, and telephone companies, and assessed upon the company's real estate, on its capital stock, on its mileage, or on its net or gross earnings; (3) poll taxes in a few cities, including Boston and Philadelphia, the returns from which are comparatively small; (4) license fees exacted from a multitude of different enterprises and pursuits, including theaters, motor vehicles,<sup>3</sup> street vendors, and plumbers;<sup>4</sup> (5) state grants or sub-

<sup>1</sup> On the growth of city activities in Detroit, and the consequent increase in governmental costs, see *Nat. Mun. Rev.*, XI, 317-320 (Oct., 1922).

<sup>2</sup> It has been computed that in 1923 New York City spent every day for governmental purposes the equivalent of a ton and a half of gold. On the city's financial transactions for 1929, see M. Adams, "New York's Three Billion Dollar Business," *N. Y. Times* (Feb. 16, 1930). Cf. L. Gulick, "New York City's Income," *Nat. Mun. Rev.*, XVIII, 168-171 (Mar., 1929).

<sup>3</sup> M. N. Halsey, "Municipal Vehicle Taxation," *Nat. Mun. Rev.*, XVI, 181-184 (Mar., 1927).

<sup>4</sup> New York and Chicago each have more than 100 licensed occupations.

ventions for special purposes, such as education and sometimes highway improvement; (6) income from municipal enterprises, especially from water-rates and the sale of electricity to private consumers, and from a few municipally-owned street railways—sources which are vastly more productive in European than in American cities; (7) endowment or trust funds provided by private benefaction, the income being useable for certain specified activities, especially along social-welfare lines, notable instances being found in Cleveland<sup>1</sup> and some other large cities; (8) trade or business taxes, found in New Orleans and some other municipalities of the South and West, and much less common than in French and German cities, although, in view of the cutting off of revenue from liquor licenses, likely to be more widely adopted in the near future; (9) special assessments levied upon property-owners to meet a large part of the cost of local improvements, such as street paving and laying sewers;<sup>2</sup> and (10) special land taxes and unearned increment taxes, which have been experimented with in a few American and Canadian cities.<sup>3</sup>

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The total revenue from all of these sources is, as a rule, scarcely adequate to meet ordinary running expenses.<sup>4</sup> Consequently, when new enterprises are started, resort generally has to be made to loans. These usually take the form of either sinking fund or serial bond issues.<sup>5</sup> Many charters or state laws require a popular referendum to be taken before bonds of either description can be issued. Furthermore, in practically all states there is either a constitutional or a statutory limitation upon the amount of indebtedness that cities may incur.<sup>6</sup> The object of the latter restriction is wholesome. But, although the debt limit is usually fixed in some ratio

Indebted-  
ness

<sup>1</sup> See H. J. Reber, "The Community Trust," *Nat. Mun. Rev.*, VI, 366-371 (May, 1917).

<sup>2</sup> See Nat. Mun. League Committee on Sources of Revenues, "Special Assessments," *Nat. Mun. Rev.*, XI, 43-58 (Feb., 1922).

<sup>3</sup> R. M. Haig, "New Sources of City Revenue," *Nat. Mun. Rev.*, IV, 594-603 (Oct., 1915); L. W. Lancaster, "Sources of Revenue in American Cities," *Annals Amer. Acad. Polit. and Soc. Sci.*, XCV, 123-132 (May, 1921). On the single tax in American cities, see *Nat. Mun. Rev.*, III, 737-741 (Dec., 1914); *ibid.*, IV, 616-621 (Oct., 1915); A. N. Young, *The Single Tax Movement in the United States* (Princeton, 1916).

<sup>4</sup> L. D. Upson, "What Our Cities Can Afford to Spend," *Nat. Mun. Rev.*, XVI, 462-466 (July, 1927).

<sup>5</sup> See p. 815 above.

<sup>6</sup> H. Seerist, "Constitutional Restrictions on Municipal Debt," *Jour. Polit. Econ.*, XXII, 365-383 (Apr., 1914); also *Nat. Mun. Rev.*, III, 682-692 (Oct., 1914); H. G. Loeffler, "Municipal Tax Limits and Economy," *Nat. Mun. Rev.*, X, 475-480 (Sept., 1921); A. R. Atkinson, *The Effects of Tax Limitations upon Local Finances in Ohio, 1911-1912* (Cleveland, 1923); C. E. Rightor, "The Bonded Debt of 227 Cities," *Nat. Mun. Rev.*, XIX, 414-425 (June, 1930).

to taxable valuation, and is therefore not strictly uniform, it takes no account of the varying resources and financial conditions of different cities, and, in its actual operation, is open to serious criticism. Nothing of the sort is found in European countries.

Subject to such limitations as may be set by the state constitution or laws, determination of the kinds of taxes to be employed and the amounts to be levied is exclusively a function of the council or commission, as the body directly representing the tax-payers.<sup>1</sup> It is likewise exclusively a function of this body to pass the annual appropriation ordinance, allotting the city's income to the various departments and activities. The compilation and revision of the estimates of the financial needs of the different departments, together with a forecast of the amount of revenue to be expected from various sources—in other words, the preparation of the budget—is another most important phase of the city's financial activities. Different cities follow different budgetary methods: in New York, the preparation of the budget is assigned to a special body called the board of estimate and apportionment, consisting of the mayor, the comptroller, the president of the board of aldermen, and the five borough presidents;<sup>2</sup> in Chicago and many other cities not under commission government, the budget is prepared by a committee of the city council; in commission-governed cities, it is prepared by the commission, and in commission-manager cities by the manager; while in Boston and some other places the mayor alone is made responsible for the program of expenditures.<sup>3</sup> The enactment of the budget, with or without modifications, takes the form of the annual appropriation ordinance, and is the proper function of the city council or commission. In this way, that body is made responsible, at least in part, to the tax-payers for the uses to which the city's money is put.<sup>4</sup> Sometimes the mayor is given a

<sup>1</sup> Tables showing the comparative tax rates in a large number of cities, 1922-1930, appear in *Nat. Mun. Rev.*, XI, 412-416 (Dec., 1922); *ibid.*, XII, 719-728 (Dec., 1923); *ibid.*, XIII, 698-708 (Dec., 1924); *ibid.*, XIV, 753-764 (Dec., 1925); *ibid.*, XV, 706-709 (Dec., 1926); *ibid.*, XVI, 778-789 (Dec., 1927); *ibid.*, XVII, 751-763 (Dec., 1928); *ibid.*, XVIII, 753-767 (Dec., 1929); *ibid.*, XIX, 829-842 (Dec., 1930).

<sup>2</sup> J. McGoldrick, "The Board of Estimate and Apportionment of New York City," *Nat. Mun. Rev.*, Supp., XVIII, 125-152 (Feb., 1929).

<sup>3</sup> M. L. Walker, "Budget-Making in Seven Cities," *Nat. Mun. Rev.*, XIX, 302-307 (May, 1930). Cf. "A Model Municipal Budget Law," *ibid.*, Supp., XVII, 437-445 (July, 1928).

<sup>4</sup> J. W. Routh, "Humanizing the Budget," *Nat. Mun. Rev.*, VIII, 598-600 (Nov., 1919); L. D. Upson, "The Other Side of the Budget," *ibid.*, XII, 119-122 (Mar., 1923); F. R. Kent, "Emptying a City's Pork Barrel," *World's Work*, LII, 176-180 (June, 1926); L. D. Upson and C. E. Rightor,



limited veto power over separate items in the appropriation bills; and in Boston, New York, and a few other cities the council may modify the budget as presented to it only by reducing the amount appropriated for any given purpose or by striking out items.

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The assessment of taxes, the collection of revenues from all sources, and their expenditure in accordance with the appropriation ordinances are distinctly administrative functions which are exercised by one or more city departments or officials. The assessment of property for the purpose of municipal taxation is sometimes performed by county officials; but generally each city forms a separate unit with its own corps of assessors, who seldom, if ever, enter upon their task with such training or experience as would qualify them to perform this extremely important work with any approach to scientific method or accuracy. In recent years, a few cities have introduced improvements in this connection which have attracted wide attention.<sup>1</sup>

Assessment  
and collec-  
tion of  
taxes

The city treasurer serves as the custodian and disbursing officer of municipal funds. The revenues of the city may be paid to him directly by the tax-payers or collected by another official called the city tax collector and then turned over to the treasurer. Department heads draw requisitions or warrants upon the treasurer from time to time for the amounts allotted to their departments in the appropriation ordinance. But before these warrants are honored by the treasurer they must be approved by the city auditor or comptroller.

Disburse-  
ments and  
accounts

Finally, it is highly desirable that the accounts of all city departments be kept in accordance with a single, uniform, scientific method. This feature of an up-to-date fiscal system is unfortunately too frequently lacking; but the past few years have brought rather widespread adoption of improved methods of departmental accounting, as is notably illustrated in Philadelphia and Dayton. On the whole, considerably greater success has been

"Standards of Financial Administration," *Nat. Mun. Rev.*, Supp., XVII, 119-132 (Feb., 1928).

<sup>1</sup> Bureau of Governmental Research, "Assessing Detroit Property," *Public Business*, No. 67 (May 10, 1922); L. Purdy, "The Assessment of Real Estate," *Nat. Mun. Rev.*, Supp., VIII, 512-527 (Sept., 1919); *Report of N. Y. Special Joint Committee on Taxation and Retrenchment* (1920), Chap. x; *ibid.*, (1921), 48-62, on assessment methods in New York cities; L. Gulick, "The Trend of Assessed Values in New York City," *Nat. Mun. Rev.*, XII, 697-700 (Dec., 1923); W. Turn, "New York City's New Assessed Valuations," *ibid.*, XV, 631-632 (Nov., 1926); A. S. Bard, "Tall Taxes for Tall Buildings," *ibid.*, XVI, 234-242 (Apr., 1927); L. Gulick, "The Assessor's Record Card," *ibid.*, XIII, 355-358 (July, 1924); H. C. Pratt, "The Assessment of Real Estate and Buildings in Rochester, N. Y.," *ibid.*, XVIII, 87-93 (Feb., 1929).

achieved in reforming the financial, purchasing,<sup>1</sup> and general administrative methods of cities than has been attained in connection with state governments.

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## CHAPTER XLVI

### TOWNSHIPS, VILLAGES, AND SPECIAL DISTRICTS

Other  
local  
government  
units

Next to cities in importance as local government units are the towns and townships which are found in the great group of states comprising New England, New York, Pennsylvania, and the north central states, including Nebraska and the Dakotas. In the South and Far West, on the other hand, township government is practically non-existent. Functions which elsewhere are performed by town government are, in these regions, exercised by the county authorities, or are divided up among relatively unimportant county divisions (like the road districts in some Illinois counties), which have no corporate powers and seldom have the authority to levy taxes. In sharp contrast with these anæmic local government units of the South and West are the town governments in New England, which are still vigorous and flourishing, although some of them are older than the counties and states under which they operate.

The New  
England  
town

New England towns<sup>1</sup> have practically all of the rights of municipal corporations; and, although without charters, they enjoy almost all of the powers that a city charter confers. In addition to the management of purely local affairs, the town acts as the agent of the state in the assessment and collection of taxes, in keeping records of vital statistics and of land transfers,<sup>2</sup> in enforcing health laws, and in various other ways. Except in one or two states, the town is also the unit of representation in the state legislature for one house, or even both houses; and everywhere it is an election district for state and national purposes.

The town-  
meeting

Most of the powers granted to New England towns are vested in, and exercised by, the town-meeting, which is the principal organ of town government.<sup>3</sup> This is a mass-meeting of the qualified voters

<sup>1</sup> The New England town is not necessarily an urban center. Some of the towns are such, and have populations running into the thousands. But most of them are rural communities covering twenty-five or thirty square miles. In other words, geographically they are broadly similar to the townships of other parts of the country.

<sup>2</sup> In Vermont, Connecticut, and Rhode Island.

<sup>3</sup> G. E. Googin, "The Town Meeting," *Outlook*, LXXXII, 561-565 (Mar., 10, 1906).

of the town, held at least annually in the town hall. The assemblage is primarily a legislative body; and the actions that it takes may relate to a great variety of subjects of local interest, including the upkeep of the town water-works, cemetery, library, high school, town hall, and other public property; construction of a sewerage system; laying out and improving highways; authorizing contracts for street lighting; enacting local police regulations, known as by-laws; and, until recently, deciding whether licenses should be granted for the sale of liquor. An especially important function is that of providing the necessary financial legislation to meet the expenses of these and any other town enterprises; so the town-meeting fixes the tax rate, appropriates money for the different town activities, including the support of the public schools, and authorizes the borrowing of money when such a step becomes necessary. In the discussion of these varied items of business, any voter present has a right to participate; and non-voters are also sometimes allowed to speak. Proceedings are carried on with at least nominal regard for the rules of parliamentary law. Not infrequently, subjects come up for consideration which arouse very general interest, and even divide the townspeople into hostile camps; and under these circumstances the proceedings reach their maximum of interest, and are attended by much of the excitement, speech-making, and parliamentary manœuvring that characterize political conventions. At other times, proceedings are dull and lifeless, following merely the customary formality and routine.

As towns grow in population,<sup>1</sup> a general mass-meeting is found unwieldy and ill-adapted to the expeditious and thoughtful handling of business. Consequently, some large towns have a permanent or standing advisory committee of from ten to forty members, appointed by the selectmen, to investigate any subject referred to them and to report their recommendations at a later meeting. Special committees, too, are sometimes designated for the same purpose. As a rule, committee recommendations carry great weight with the assembled voters.

The policies determined upon in town-meeting are carried out,

<sup>1</sup> The largest New England town is Brookline, Massachusetts, just outside of Boston, which has a population of 47,490. This town has recently adopted a limited town-meeting system, and fourteen other Massachusetts towns have taken similar action. See E. A. Cottrell, "Recent Changes in Town Government," *Nat. Mun. Rev.*, VI, 64-69 (Jan., 1917); J. F. Sly, "Contemporary Town-Meeting Government in Massachusetts," *ibid.*, XV, 444-446 (Aug., 1926); "Massachusetts Town-Meeting Bends but Does Not Break," *ibid.*, XV, 681-685 (Dec., 1926).

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officers

Selectmen

Clerk

Treasurer

School  
commit-  
teesMiscel-  
laneous  
officersWestern  
townships

the taxes levied are collected, and the appropriations authorized are expended, by officers chosen by the town-meeting and directly responsible to it for the greater part of their official acts. But instead of a single chief executive to carry into effect the will of the local lawmaking body, one finds a variety of boards or single officials, usually chosen directly by the voters. The most important of these is the small group of three, five, or sometimes nine, persons called the selectmen. Chosen by the town-meeting, and comprising a sort of executive committee of that body, these officials act almost entirely as the town-meeting directs, and hence enjoy very little independent or discretionary authority. They are generally elected for a single year, although reëlections are very common; and they manage town affairs from one general meeting to the next.<sup>1</sup> Second to them in importance is the town clerk, also elected annually, but often continued in office year after year until he becomes the acknowledged authority on town history, precedents, and genealogy. He keeps the records of the town-meeting, issues marriage licenses, prepares vital statistics, and, in Vermont, Rhode Island, and Connecticut, records deeds, mortgages, and other legal documents. There is always a town treasurer, sometimes an auditor, and invariably at least one constable to arrest violators of the law, serve court processes, and act as tax collector.<sup>2</sup> There is also an elected school committee, or board, which in most New England states has the direct control of all the town schools. Finally, there is a long list of minor officials, most of whom are appointed by the selectmen and have merely nominal duties: for example, justices of the peace; road surveyors charged with keeping public roads and bridges in repair; field-drivers and pound-keepers; fence-viewers, who settle disputes among farmers in regard to boundary lines; sealers of weights and measures, who test the accuracy of scales and measures; surveyors of lumber; keepers of almshouses; park commissioners; fish wardens; hog-reeves; inspectors of various kinds; and numerous other minor officials, some of whom bear quaint titles and have merely nominal duties. Many of these officers serve without pay, or, at the most, receive only small fees.<sup>3</sup>

Unlike the towns of New England, New York, New Jersey, and

<sup>1</sup> Town managers are authorized in Vermont, Massachusetts, and Connecticut.

<sup>2</sup> See W. L. Wallace, "Constables and Justices of the Peace in Iowa," *Nat. Mun. Rev.*, XIII, 7-10 (Jan., 1924).

<sup>3</sup> J. A. Fairlie and C. M. Kneier, *County Government and Administration*, Chap. xx.

Pennsylvania, which have very irregular boundaries and differ greatly in area, the townships of the middle-western states are, with rare exceptions, of uniform size and shape, consisting of a rectangle approximately six miles square with straight sides.<sup>1</sup> These are often called civil townships, in order to distinguish them from the geographical or congressional townships of the same size and shape which were mapped out when the original land-surveys were made under authority of an act of Congress. Their boundaries may or may not coincide with those of the congressional townships, but there is no necessary legal or political connection between the two. Congressional townships are found practically everywhere west of the Alleghenies, whereas civil townships exist only in the states of the Middle West; and in several of these, notably Illinois, Nebraska, and Missouri, they are to be found in only certain parts of the state. The boundaries of civil townships are always determined by the state or county authorities, whereas those of congressional townships are laid down by officials of the national government. Finally, the civil township is an important unit of local government, while the congressional township has no governmental organization and performs no governmental functions, serving almost solely as the basis for land surveys and records.

Although the western civil township, as a municipal corporation, has substantially the same legal status as the New England town, and has elective officers closely corresponding, both in title and in functions, to those of its eastern prototype, the most distinctive feature of New England town government, *i.e.*, the town-meeting, is either entirely absent or exists in a greatly attenuated form. Town officers may be elected in what is called a town-meeting, and questions may be submitted for popular approval. But in the northern tier of central states, including New York and New Jersey, township meetings have very much less authority than in New England; nowhere west of the Hudson does the town-meeting show any such vitality as has characterized it in its native habitat.<sup>2</sup> And in the southern tier of central states, including Pennsylvania, Ohio, Indiana, Iowa, Kansas, and Missouri, there is no assembly of the township voters at all.

Township  
government

Corresponding to the New England selectmen—a title, however, which nowhere appears in the central states—is a committee or

<sup>1</sup> The rectangular system is found also in the northern part of Maine.

<sup>2</sup> See *Ill. Const. Conv. Bull.*, No. 12 (1920), "County and Local Government in Illinois," 1024 ff.

board of supervisors or trustees in Pennsylvania, Ohio, and Minnesota. In other states, there is a well-defined head official, quite unlike any New England official, called the supervisor in New York, Michigan, and Illinois, and township chairman or township trustee in other states. Remaining township officers correspond rather closely, both in name and in function, to the officers of the New England town.<sup>1</sup>

On the whole, township government, outside of New England, plays a relatively unimportant rôle. This is especially true in the West, where the township is an artificial area, almost totally lacking the social unity of the old New England town. Other factors go to produce the same result: the relatively larger part taken by county officials in poor-relief, and in highway and school administration; and the common practice of incorporating portions of townships as separate municipal corporations, thus taking them largely out from under the jurisdiction of the township authorities. To a brief description of the most important of these corporations, called villages, a few paragraphs must be devoted.

## Villages

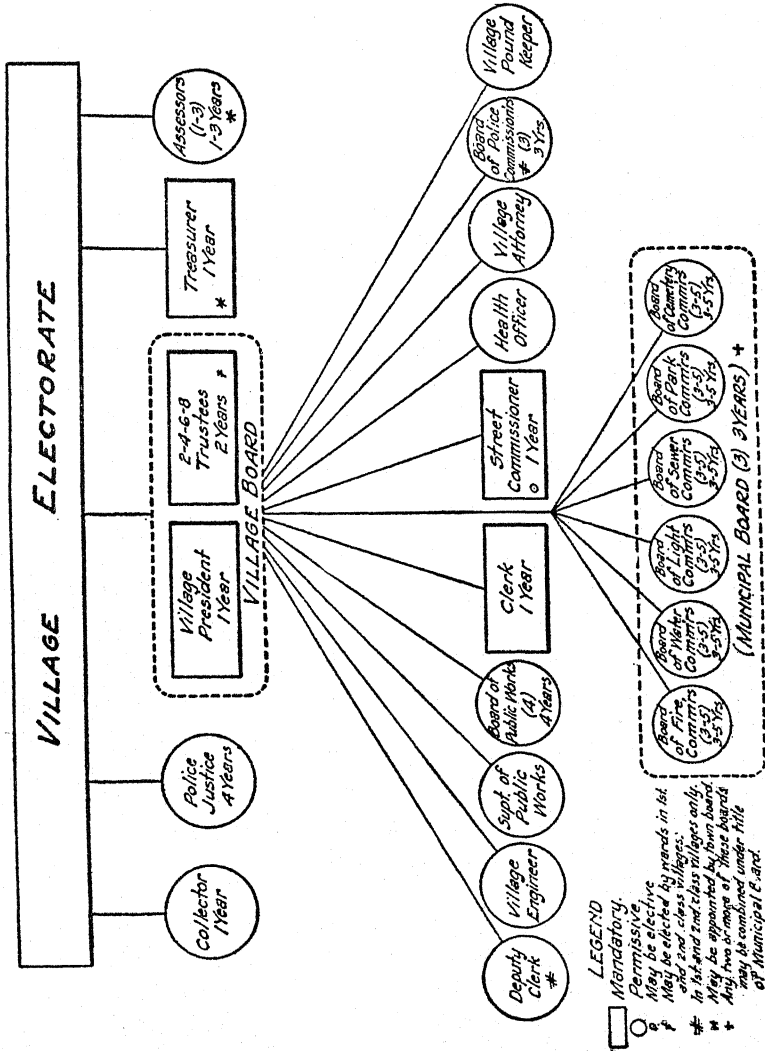
When a portion of a township, or of a county which does not have township government, becomes more thickly settled than the rest and begins to take on a semi-urban aspect, its inhabitants are certain to demand more in the way of special public services, such as fire protection, street paving and lighting, water-supply and sewerage facilities, than the township or county authorities will care to undertake to provide. Sooner or later, therefore, such communities usually become incorporated as villages or boroughs. State law often requires that a community seeking incorporation as a village shall have a certain minimum population and occupy a certain minimum area, and that the question of incorporation shall have been previously submitted to popular vote. In Illinois, for example, any area of not less than two square miles, with at least three hundred inhabitants, if it is not already within a village or city, may be incorporated as a village by a vote of the people at a special election. It remains a village until it has a thousand inhabitants, when it may, but is not obliged to, change to a city government.<sup>2</sup> On the other hand, there are villages in Vermont, Maine, and Connecticut with as few as forty-two, eighty-three, and

<sup>1</sup> J. A. Fairlie and C. M. Kneier, *County Government in the United States*, Chap. XXI.

<sup>2</sup> Oak Park, a suburb of Chicago with 63,982 inhabitants, still retains the village form of government. Speaking broadly, the distinction between cities and villages is not one of size or importance but merely one of legal status.



# **COMPOSITE CHART OF VILLAGE GOVERNMENT IN THE STATE OF NEW YORK** (as established by the Village Law)



(REPORT OF SPECIAL JOINT COMMITTEE ON TAXATION AND RETRENCHMENT, 1923)

thirty-four inhabitants, respectively. Incorporation gives the village the power to undertake the special community services mentioned above; and for these purposes, to borrow money and raise taxes, and to have its own village government distinct from the governments of township and county. There are more than ten thousand of these incorporated villages in the United States. They are found in all parts of the country, including New England and the southern and western states; but by far the greater number are in the north-central section, there being about eight hundred in Illinois alone. In this region, they are also relatively larger and more important than elsewhere. The boroughs of Connecticut and Pennsylvania and the incorporated towns of Illinois are merely villages under other names.

Village  
government

The government of villages is a comparatively simple affair. In some states, notably New York, there is a village meeting, much like the town meeting, but attended, of course, only by the qualified voters of the village. In most states, on the other hand, there is no such meeting, and the decision of practically all questions is left to certain elected officials. In such villages, the principal governing body is the village board, called by such various names as trustees (New York), assessors (Maine), commissioners (New Hampshire), burgesses (in boroughs), or the village council. Other village officers include a mayor or president or chief burgess, who is the village chief executive, and is sometimes given a veto upon the acts of the village board; also a clerk, a treasurer, a marshal or police officer, and a police magistrate with functions similar to those of a justice of the peace. Thus, in structure and functions, the government of villages bears a striking resemblance to the government of cities, except, of course, that usually it is on a decidedly smaller scale.<sup>1</sup> Indeed, it might almost be said that villages are miniature cities; at any rate, they often mark transitional stages in the evolution of cities from what were originally rural communities.

Special, or  
quasi-  
municipal,  
corporations

No description of local government in the United States to-day is complete which does not at least mention the newer districts that have been created in many parts of the country to fulfill some special purpose for which the older units of local government have been found wholly or largely inadequate. These are commonly called special, or quasi-municipal, corporations, in order to dis-

<sup>1</sup> In New York, a general village law became effective in 1927, providing a model charter for all incorporated villages, about 450 in number. This law modifies the plan appearing on the accompanying chart. The chief executive, now called mayor, and the village trustees are the only elective officers.

tinguish them from the older municipal corporations called cities and villages. Sometimes these newer districts lie wholly within the boundaries of a city, a town, or even a village; and generally they are entirely within a county. Nevertheless, their boundaries seldom coincide exactly with those of the older political subdivisions. In the majority of instances, they are unions of two or more villages, townships, or small cities, or they comprise territory lying within more than one such unit. At all events, and despite the fact that they may contain practically the same inhabitants, they are legally quite independent of county, township, village, or city authorities in dealing with matters falling within their jurisdiction.

How extensively these special municipal corporations have developed, particularly in recent years, is indicated by the fact that in 1929 such corporations existed under eighty-nine different names, representing forty-seven distinct varieties, counting school districts only once.<sup>1</sup> For convenience, all may be classified in five main groups: (1) school districts, (2) public utilities districts, (3) sanitary districts, (4) water-control districts, and (5) miscellaneous.

School districts are probably the oldest and most numerous of these local subdivisions; they are also more widely distributed over the country, and they appear in a larger variety of forms, than any other class unless it be the fifth named. No less than eight different species, under at least thirty-four names, have been discovered and catalogued, five or six varieties not infrequently being found in the same state. A school district is the unit of local government with which the great majority of native Americans first come into conscious personal contact; and no organ of local government possesses greater potentialities for the training of intelligent and useful citizens. By whatever name they may be called, all such districts exist for essentially the same purposes: to provide the necessary land, buildings, and teachers, and to levy and appropriate the necessary taxes, for the maintenance of elementary, secondary, and high schools. Each district has its school board, school committee, or board of education, usually elected by popular vote in smaller communities, but commonly appointed in places of considerable size. This board generally selects a clerk or secretary, a treasurer, and, in the larger places, a school superintendent.

Public utilities districts have been created in considerable

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Classification:  
tion:

1. School  
districts

2. Public  
utilities  
districts

<sup>1</sup> For the list, see F. H. Guild, "Special Municipal Corporations," *Nat. Mun. Rev.*, XVIII, 319-323 (May, 1929).

variety for the sole, or chief, purpose, as the name indicates, of constructing, owning, and operating works necessary to provide the inhabitants of the district with water, gas, electricity, or transportation. They require no special comment.

## 3. Sanitary districts

Sanitary districts, under various names, have for their main object the improvement and protection of the public health by providing for the establishment of boards of health and the creation and maintenance of drainage and sewerage systems.<sup>1</sup> The best-known example is the Sanitary District of Chicago, established in 1889, which comprises, in addition to the entire urban territory, one hundred ninety-five square miles outside of the city, and ninety-seven per cent of the population of Cook county. At a cost of nearly one hundred million dollars, the trustees of this district have constructed, and now operate, over sixty miles of canals connecting the Chicago and Illinois rivers, together with the necessary engineering works for reversing the current of the Chicago river. As a result, the sewage of Chicago is no longer turned into Lake Michigan, but is largely diverted into the Illinois and Mississippi rivers.<sup>2</sup>

## 4. Water-control districts

Water-control districts have to do primarily with impounding or distributing water supplies, diverting water courses, draining swamps, or protecting given areas against floods or tidal waves. Of the last-named, a notable example is the Miami conservancy district in Ohio, created in 1913 after the Dayton flood, and covering nine counties. Perhaps the most common illustrations are the irrigation, drainage, or reclamation districts which have been established in about a dozen states. Seven hundred reclamation districts are found in California alone, and an even greater number of drainage districts in Illinois.

## 5. Miscellaneous districts

In the miscellaneous class, one finds a heterogeneous, not to say motley, array of local-government districts: road, paving, and bridge districts, in a dozen states; fire and forest-fire districts in New England, New York, and California; forest-preserve dis-

<sup>1</sup> W. M. Olson, "The Value of Sanitary Districts," *Amer. City*, XXVII, 557-563 (Dec., 1922); F. P. Gruenberg, "Incorporated Districts—Blessings or Drawbacks?," *ibid.*, XXVIII, 593-595 (June, 1923).

<sup>2</sup> G. A. Soper, *Report to the Chicago Real Estate Board on the Disposal of Sewage and Protection of Water Supply of Chicago* (1915); Trustees of the Sanitary District of Chicago, *Memorandum Concerning the Drainage and Sewage Conditions in Chicago*. . . (1923); *Literary Digest*, LXXXIV, Jan. 31, 1925, pp. 8-9, "Press of the Great Lakes on Chicago's Diversion of Water." At the present time (1931), the Chicago Sanitary District is engaged in the construction of enormous sewage treatment plants, in order to diminish the amount of sewage disposed of through the drainage canal system.

tricts;<sup>1</sup> local improvement districts or associations, almost without number; and a large assortment of park districts. Chicago, for example, has no fewer than seventeen park districts, each with its own governing body, and all but one with power to levy and appropriate taxes for park purposes.<sup>2</sup>

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In the methods by which these special districts are created, in their form of government, and in the powers which they enjoy, there is, the country over, the greatest diversity. All, however, are endowed with some of the attributes of a municipal corporation, including the right to acquire, hold, and dispose of property, to sue and be sued in the courts, to have a corporate seal, to pass regulations called by-laws; and, most important of all, to levy taxes, issue bonds, and take such other steps as may be authorized by law for the accomplishment of the special objects for which the district has been created. These corporate powers are generally exercised through a small governing body of commissioners, directors, or trustees, who are either elected by popular vote, or, less frequently, appointed by some of the state or county authorities. Almost invariably, they serve for short terms and without compensation.

Corporate  
powers

In many—perhaps most—instances, these special municipal corporations have served useful purposes, and have justified their establishment. Nevertheless, their multiplication has yielded at least two unfortunate results: it has given rise in some states to a most bewildering system of local government; and it has burdened the voters, in those states particularly, but everywhere in some degree, with an excessively long ballot. To Illinois belongs the rather dubious distinction of having perhaps the most intricate system of local government of any state in the Union. Besides 102 counties

Undesir-  
able  
results

<sup>1</sup> Perhaps the most important of these forest preserve districts is that of Cook county, Illinois, created in 1915 for the purpose of providing for the metropolitan district of Chicago an elaborate system of outer parks and connecting boulevards. More than 25,000 acres have been acquired and permanently set apart for recreational purposes. See Forest Preserve Commission, *Forest Preserves of Cook County, Illinois* (1918).

<sup>2</sup> There are numerous other political subdivisions in every state which are not described in the present portion of this book; for example, congressional districts for the election of representatives in Congress; assembly and senatorial districts for the election of members of the state legislature; judicial districts for the choice of judges of the circuit, district, superior, supreme, or other state courts; and probate districts in New England for the election of judges of the probate courts. These districts usually embrace more than one county, although the most populous counties are frequently divided into two or more districts. As these divisions exist solely for electoral or judicial purposes, and have no governmental organization or corporate powers, description of them is unnecessary in the present connection.

and over 70 cities of more than 5,000 inhabitants, there are more than 1,400 townships, about 800 villages, more than 12,000 school districts of one kind or another, and 800 drainage districts, besides sanitary districts, incorporated towns, and park and road districts, whose number is large but not exactly known. The nadir has been reached in the local government system in Cook county, which constitutes a veritable jungle: in the city of Chicago there are no less than thirty-eight distinct local-government units, most of them independent of one another; while outside of the city, in the area of the sanitary district, there are 162 other local governments; and beyond the sanitary district there are 192 additional local governments—making a grand total in Cook county of 392 separate units of government. Naturally, one finds a bewildering maze of elective officials. There are 423 elective officers in Chicago, 1,648 in the sanitary district, and 2,571 in the entire county. Every voter in Chicago is expected to vote for at least 191 different officials in a period of about nine years; while in other parts of the county a voter is supposed to have a voice in filling from 180 to 205 different positions in the same length of time.<sup>1</sup>

Superficially, all this appears like democratic government exalted to the *n*th power. But if the tests of true democratic government were applied to such situations, plenty of instances could be found of little oligarchies masquerading in the trappings of democracy, and of the cloven hoof of autocracy protruding from beneath the cloak of democratic forms. Simplification and unification, to a far greater degree than commonly prevails, are the outstanding needs of both our state and local governments; indeed, they are indispensable prerequisites to the effective functioning of these governments as instruments of a genuine democracy. Verily, verily, true democratic government consisteth not in a multitude of elective officers, but, rather, in the discriminating popular choice of a few who are continuously sensible of their responsibility to an electorate at once informed, intelligent, and alert.

<sup>1</sup>See *Ill. Const. Conv. Bull.*, No. 11 (1920), "Local Governments in Chicago and Cook County," 935; *ibid.*, No. 12, "County and Local Government in Illinois," 1036. Election expenses for national, state, and local offices cost the tax-payers of Cook county in 1920 over \$2,200,000. See Chicago Bureau of Public Efficiency, *Growing Cost of Elections in Chicago and Cook County* (1912), and *The High Cost of Elections in Chicago and Cook County* (1921); J. L. Jacobs, "Simplification of Government in Metropolitan Chicago," *Nat. Mun. Rev.*, XVIII, 696-702 (Nov., 1929); E. M. Martin, "Pulling Chicago's Local Governments 'Out of the Red,'" *ibid.*, XIX, 75-80 (Feb., 1930); C. E. Merriam, *Chicago, a More Intimate View of Urban Politics* (1929).

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## APPENDIX

### CONSTITUTION OF THE UNITED STATES OF AMERICA

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

#### ARTICLE I

##### SECTION I

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

##### SECTION II

The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons,<sup>1</sup> including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.<sup>2</sup> The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose

<sup>1</sup> Altered by Fourteenth Amendment.

<sup>2</sup> Rescinded by Fourteenth Amendment.

three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.<sup>1</sup>

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

### SECTION III

The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six years; and each Senator shall have one vote.<sup>2</sup>

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.<sup>3</sup>

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of the President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

<sup>1</sup> Temporary provision.

<sup>2</sup> Modified by Seventeenth Amendment.

<sup>3</sup> Modified by Seventeenth Amendment.

## SECTION IV

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

## SECTION V

Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

## SECTION VI

The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States. They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

## SECTION VII

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

## SECTION VIII

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts by securing for

limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

#### SECTION IX

The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.<sup>1</sup>

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

<sup>1</sup> Temporary provision.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

#### SECTION X

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

### ARTICLE II

#### SECTION I

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons

voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.<sup>1</sup>

The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he may have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."

<sup>1</sup> Superseded by Twelfth Amendment.

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## SECTION II

The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

## SECTION III

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

## SECTION IV

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

## ARTICLE III

### SECTION I

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts,



shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

#### SECTION II

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; <sup>1</sup> between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

#### SECTION III

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

### ARTICLE IV

#### SECTION I

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

<sup>1</sup> Restricted by Eleventh Amendment.

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### SECTION II

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.<sup>1</sup>

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.<sup>2</sup>

### SECTION III

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State.

### SECTION IV

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

## ARTICLE V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress, provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any

<sup>1</sup> Extended by Fourteenth Amendment.

<sup>2</sup> Superseded by Thirteenth Amendment in so far as pertaining to slaves.

manner affect the first and fourth clauses in the ninth section of the first article;<sup>1</sup> and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

## ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.<sup>2</sup>

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

## ARTICLE VII.

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

[Signed by]<sup>3</sup>

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ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION:

**Article I.** Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

<sup>1</sup> Temporary clause.

<sup>2</sup> Extended by Fourteenth Amendment.

<sup>3</sup> The signatures are omitted here.

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**Article II.** A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

**Article III.** No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

**Article IV.** The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

**Article V.** No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

**Article VI.** In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**Article VII.** In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

**Article VIII.** Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Article IX.** The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

**Article X.<sup>1</sup>** The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

<sup>1</sup> The first ten amendments seem to have been in force from November 3, 1791.

**Article XI.**<sup>1</sup> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

**Article XII.**<sup>2</sup> The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

**Article XIII.**<sup>3</sup> *Section 1.* Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly

<sup>1</sup> Proclaimed in force January 8, 1798.

<sup>2</sup> Proclaimed September 25, 1804.

<sup>3</sup> Proclaimed December 18, 1865.

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convicted, shall exist within the United States or any place subject to their jurisdiction.

*Section 2.* Congress shall have power to enforce this article by appropriate legislation.

**Article XIV.**<sup>1</sup> *Section 1.* All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Section 2.* Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

*Section 3.* No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

*Section 4.* The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

*Section 5.* The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<sup>1</sup> Proclaimed July 28, 1868.

**Article XV.**<sup>1</sup> *Section 1.* The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

*Section 2.* The Congress shall have power to enforce this article by appropriate legislation.

**Article XVI.**<sup>2</sup> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

**Article XVII.**<sup>3</sup> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

**Article XVIII.**<sup>4</sup> *Section 1.* After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

*Section 2.* The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

*Section 3.* This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

**Article XIX.**<sup>5</sup> *Section 1.* The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

*Section 2.* Congress shall have power to enforce this article by appropriate legislation.

<sup>1</sup> Proclaimed March 30, 1870.

<sup>2</sup> Proclaimed February 25, 1913.

<sup>3</sup> Proclaimed May 31, 1913.

<sup>4</sup> Proclaimed January 29, 1919.

<sup>5</sup> Proclaimed August 26, 1920.





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